

*United States Court of Appeals
for the Second Circuit*



APPENDIX

74-2039

6/25

IN THE

United States Court of Appeals
FOR THE SECOND CIRCUIT

GENERAL MILLS, INC., a corporation; THE PILLSBURY COMPANY, a corporation; SEABOARD ALLIED MILLING CORPORATION, a corporation,

Plaintiffs-Appellants,

vs.

BETTY FURNESS, Commissioner,
Department of Consumer Affairs, City of New York,
Defendant-Appellee.

CIVIL ACTION—ON APPEAL FROM THE FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK
SAT BELOW: HON. C. B. MOTLEY, J.U.S.D.C.

JOINT APPENDIX

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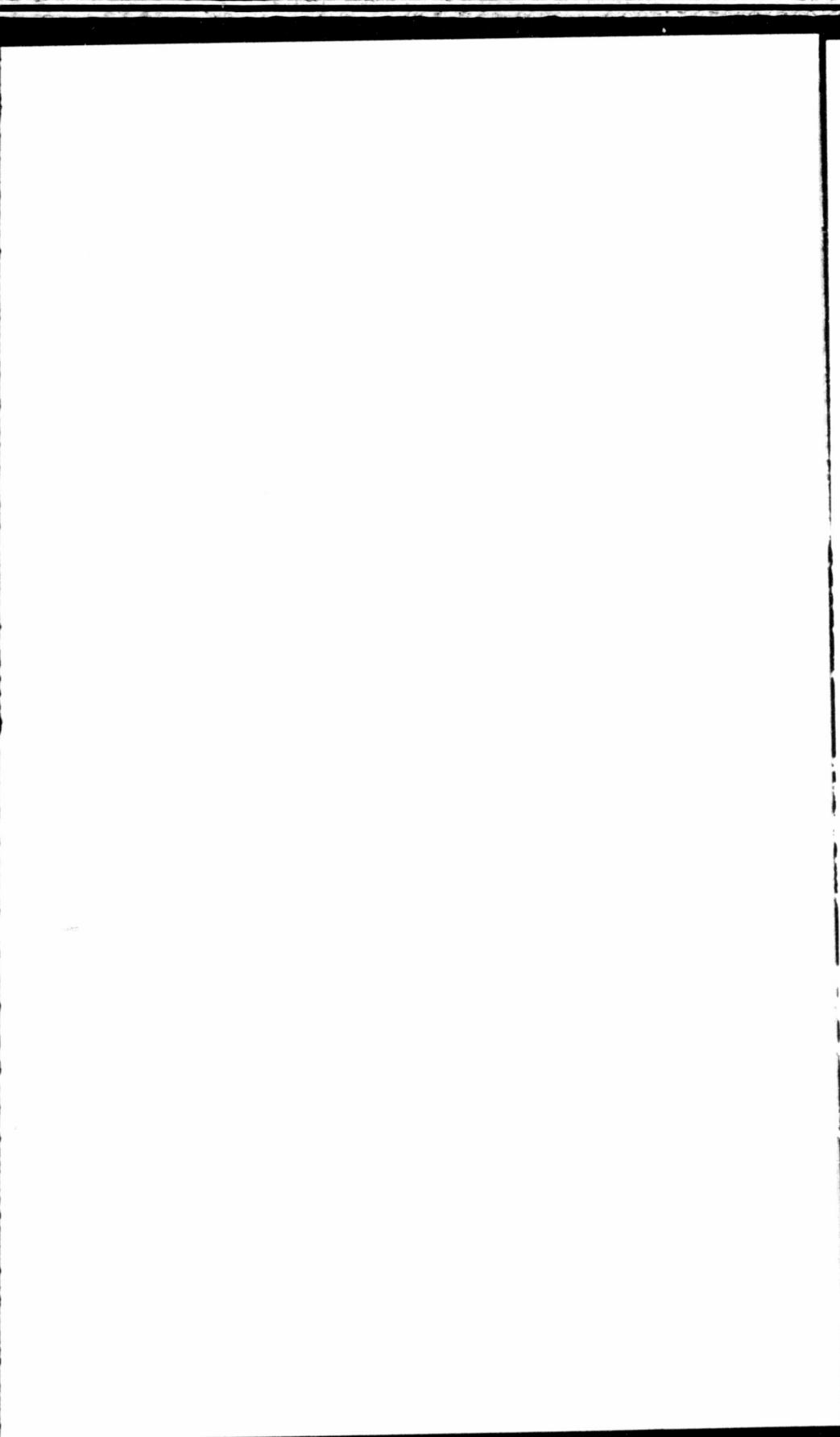
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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET No. 74-2039

GENERAL MILLS, INC., a corporation; THE PILLS-
BURY COMPANY, a corporation; and SEABOARD
ALLIED MILLING CORPORATION a corporation,
Plaintiffs-Appellants,

vs.

BETTY FURNESS, Commissioner, Department of
Consumer Affairs, City of New York,
Defendant-Appellee.

Docket Entries

June 6, 1973	Filed Complaint. Issued Summons.
July 6, 1973	Filed pltffs' notice of motion, Re: Preliminary Injunction, ret. before Motley, J. on 7-16-73.
July 6, 1973	Filed summons with marshals re- turn: Served Betty Furness on 6-6-73. (Filed on 6-15-73.)
July 16, 1973	Filed stip and order that the return date of the motion for a prelimi- nary injunction is hereby adjourned until 7-31-73. So ordered Motley, J.
July 16, 1973	Filed stip and Order that deft. may have sixty days to answer com- plaint. So ordered. Motley, J. (Filed 6-27-73.)
July 16, 1973	Filed pltffs' brief in support of mo- tion for Preliminary Injunction.

August 13, 1973 Filed Stip and Order that the motion for preliminary injunction ret: 7-31-73 is adj'd to 10-15-73, etc. Motley, J.

October 5, 1973 Filed ANSWER of deft. to the complaint.

November 2, 1973 Filed deft.'s memorandum in opposition to motion for preliminary injunction.

November 7, 1973 Filed deft.'s notice of motion for a summary Judgment dismissing complaint or in the alternative for Judgment on the pleadings. Ret. 11-15-73.

November 7, 1973 Filed deft.'s affdvt. by Betty Furness in opposition to motion for preliminary injunction and in support of motion for summary judgment.

November 12, 1973 Filed pltffs' Reply affidavit by Jerome J. Graham, Jr.

November 12, 1973 Filed stipulation and agreed by the attys. for the parties that deft. may amend her answer to the complaint as indicated.

December 7, 1973 Filed deft.'s stip. that deft., etc., will not prosecute any court actions, civil or criminal, to recover the penalties arising out of the alleged violations at issue pending the 1-21-74 hearing in the District Court. So ordered. Motley, J.

December 19, 1973 Filed deft.'s statement in support of its motion for summary judgment.

December 19, 1973 Filed pltffs' statement in opposition to deft's motion for summary judgment.

December 19, 1973 Filed pltffs' brief in opposition to deft's motion for summary judgment.

February 25, 1974 Filed Opinion #40392 — since pltffs argue that the city ordinance is more stringent than the federal law and since the court has concluded that the two laws are not incompatible, the municipal ordinance is not preempted. The court accordingly grants deft's motion for summary judgment in part. In view of this court's disposition of deft's summary judgment motion, pltffs will prevail on the merits on if they can prove that Section 833-16.0 of the Administrative Code of the City of N.Y. unduly burdens interstate commerce. Pltffs have not made any showing that they will be able to meet that burden. Nor do the equities tip decidedly in pltffs' favor. The motion for a preliminary injunction is accordingly denied. Motley, J. (m/n).

March 8, 1974 Filed Order. In accordance with this courts' opinion dated 2-22-74

pltffs' motion for a preliminary injunction is denied and deft's motion for summary judgment is granted in part. The trial of pltffs' motion for a permanent injunction will be held on 4-29-74 and will be limited to the issue as indicated. So ordered. Motley, J. (m/n)

March 28, 1974 Filed pltffs' request for admissions.

April 29, 1974 Before Motley, J., non-jury trial begun.

April 30, 1974 Trial continued.

May 1, 1974 Trial continued and concluded (3 days). Complaint dismissed on deft's motion. Memorandum-Opinion to be filed.

May 22, 1974 Filed affdvt. and pltffs' notice of motion for an order for an injunction during the pendency of an appeal from the final judgment herein restraining and enjoining deft., etc.

May 22, 1974 Filed pltffs' brief in support of its motion for an injunction pending an appeal.

June 26, 1974 (Rec'd in Unit #3 from Chambers.) Filed deft's affdvt. of Joseph Halpern in opposition to pltffs' motion for an injunction.

June 26, 1974 Filed Memo—Opinion #40872 and Order—for reasons as indicated herein, the motion for an injunction pending appeal is accordingly

denied. So ordered. Motley, J.
(m/n)

July 3, 1974 Filed Memo Opinion #40930 and Order-pltffs' motion for a permanent injunction is denied and deft's motion to dismiss the complaint is granted. So ordered. Motley, J. (m/n)

July 16, 1974 Filed transcript of record of proceedings dated 4-29, 4-30, 5-1-74.

July 25, 1974 Filed pltffs' notice of appeal from final judgment entered 7-2-74 and from Order entered 6-26-74 denying pltffs' application for an injunction pending appeal. Copy mailed to: Adrian P. Burke, Corp. Counsel. Ent. 7-25-74.

July 25, 1974 Filed bond for costs of appeal in the sum of \$250.00—United States Fidelity & Guaranty Company.

August 8, 1974 Filed transcript of record of proceedings dated 1-28-74.

August 28, 1974 Filed Defendant's Amendment to Answer dated Nov. 14-73.

August 28, 1974 Filed Defendant's Supplemental Memorandum of Law dated Nov. 15-73.

August 28, 1974 Filed letter dated Sept. 21-73, from William J. Condon, Esq. to Judge Motley.

August 28, 1974 Filed letter dated Oct. 1-73 from Corp. Counsel to Judge Motley.

August 30, 1974 Filed transcript of record of proceedings dated 11-15-73.

September 3, 1974 Filed notice that the record on appeal has been certified and transmitted to the USCA on 9-3-74.

September 13, 1974 Filed designation of exhibits.

**Contents of Appendix and Statement of
Issues to be Presented**

SIR:

Pursuant to Rule 30(b), Federal Rules of Appellate Procedure, appellants hereby designate those parts of the record which they intend to include in the Appendix (description followed by filing date):

- (1) Complaint, 6/6/73.
- (2) Notice of Motion for a Preliminary Injunction, 7/6/73.
- (3) Answer, 10/5/73.
- (4) Notice of Motion for Summary Judgment, 11/7/73.
- (5) Affidavit of Betty Furness, 11/7/73.
- (6) Reply Affidavit of Jerome J. Graham, 11/12/73.
- (7) Stipulation Not to Prosecute, 11/7/73.
- (8) Amendment to Answer served November 15, 1973, 8/28/74.
- (9) Transcript of Hearing November 15, 1973, 8/30/74.
- (10) Defendant's Statement Pursuant to Rule 9(g), 12/19/73.
- (11) Plaintiffs' Statement Pursuant to Rule 9(g), 12/19/73.
- (12) Affidavit of Malcolm W. Jensen, 12/19/73.
- (13) Transcript of Hearing, Jan. 28, 1974, 8/8/74.
- (14) Opinion (dated 2/22/74), 2/25/74.
- (15) Order, 3/8/74.
- (16) Plaintiffs' Request for Admissions, 3/28/74.

8a *Contents of Appendix, Statement of Issues*

- (17) Defendant's Statement in Response to Request for Admissions, filed with court at trial, May 1, 1974.
- (18) Transcript of Trial held April 30-May 1, 1974, 7/16/74.
- (19) Notice of Motion for an Injunction Pending Appeal, 5/22/74.
- (20) Affidavit of Jerome J. Graham, 5/22/74.
- (21) Affidavit of Joseph Halpern, 6/26/74.
- (22) Memorandum Opinion and Order (dated 7/3/74) 7/3/74.
- (23) Notice of Appeal, 7/25/74.
- (24) Exhibits, P1, 3, 4a-c, 5 and 6 and DA.

Complaint
(Filed June 6, 1973)

Plaintiffs, General Mills, Inc., The Pillsbury Company, and Seaboard Allied Milling Corporation, complaining of defendant, say:

1. Plaintiff General Mills, Inc. is a corporation organized and existing under the laws of the State of Delaware having its principal place of business in the State of Minnesota. Plaintiff The Pillsbury Company is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Minnesota. Plaintiff Seaboard Allied Milling Corporation is a corporation organized and existing under the laws of the State of Delaware, having its principal place of business in the State of Massachusetts.

2. Defendant, Betty Furness, is Commissioner of the City of New York Department of Consumer Affairs (herein referred to as "the Department") and is a citizen of the State of New York.

3. This action is instituted and arises under the Constitution of the United States, under 15 U.S.C. §§1451 to 1461 (the Fair Packaging and Labeling Act) and under 21 U.S.C. §§301-392 (the Federal Food, Drug and Cosmetic Act). Furthermore, this action is between citizens of different states. The matter in controversy exceeds the sum of \$10,000, exclusive of interest and costs. Jurisdiction of this Court is based on 28 U.S.C. §§1331(a), 1332(a) and 1337; venue is based on 28 U.S.C. §1391. This also is a civil action for a judgment declaring the rights and other legal relations of the parties hereto pursuant to 28 U.S.C. §§2201 and 2202 in respect to an actual controversy between them which is within the jurisdiction of this Court.

4. Each plaintiff joins in this one action in that each plaintiff asserts a right to relief in respect of and arising out of the same series of transactions and occurrences, and questions of law and fact common to all of them will arise in the action.

5. Each plaintiff manufactures, packages and sells wheat flour conforming to definitions and standards of identity set forth in 21 C.F.R. Part 15, sub-part A promulgated by the Secretary of Health, Education and Welfare pursuant to 21 U.S.C. §§341, 371. Each plaintiff is engaged in interstate commerce in so doing. Said flours are "Foods" under the Federal Food, Drug and Cosmetic Act, and those sold through retail stores are "Consumer Commodities" under the Fair Packaging and Labeling Act.

6. Wheat flours are foods which, by definition of the Secretary of Health, Education and Welfare, have a moisture content of "not more than 15%." 21 C.F.R. §15.1 et seq. Wheat flours are also hygroscopic which means that their moisture content fluctuates with changes in the moisture level and/or temperature in the surrounding atmosphere. As a result of wheat flours' hygroscopic nature, a particular package of flour will vary in weight from time to time depending upon the relative humidity to which it has been exposed. Consequently, a package of flour will retain its original packed weight or gain weight when stored on a grocer's shelf in New York City when the relative humidity in the store is high. The same flour when stored on the same shelf will lose weight when exposed to low relative humidity.

7. Moisture is an essential element in the milling process, the end product of which is flour. A wheat kernel in its natural condition arrives at the flour mill with a moisture content of 10-14½%. Moisture in the wheat ker-

nel is the essential catalyst which permit the efficient fractionation of the wheat kernel and thereby promotes the ultimate objective of the milling operation which is to separate the various parts of the wheat kernel into a favorable distribution of the end products of farina, flour, germ, shorts and bran. The milling process can be divided into two categories of operation: (a) cleaning and conditioning, and (b) grinding and separating. The cleaning and conditioning process includes "tempering." In the tempering process, moisture is added to the wheat or wheat mix thereby increasing its moisture content to about 15½-16%. The purpose of adding moisture in the tempering process is to toughen the outer bran coat of the wheat kernel (pericarp) so that the bran coat will flake rather than shatter in the course of the grinding and separating processes of the mill, thereby permitting a clean separation of pericarp from endosperm (the inner portion of the wheat kernel). Properly tempered wheat will produce white flour and flour having an acceptable ash specification. Failure to temper properly will result in poor separation of endosperm from bran and consequently too much bran in the flour, and too much flour in the bran. The grinding and separating processes comprise the other category of milling operations and consist of continuous grinding, sifting, purifying and reducing operations which result in the separation of the various elements of the wheat kernel into the end products of flour and bran.

8. The grinding and reducing operations are accomplished initially by heavy corrugated rollers (the break system) and, subsequently, by heavy smooth rollers (the reduction system), whose function is to smash the inner portion of the wheat kernel or endosperm, and to flatten the outer portion of the wheat kernel, or pericarp. After each grinding operation, a sifting or purifying operation

takes place where the products are separated into different fractions, in the case of sifters by size, and, to some extent, shape by the use of bolting media (screens) or, in the case of purifiers, by size, shape and specific gravity.

9. After tempering, all the remaining milling operations result in reduction of the moisture level in the end product. Thus, at the end of the milling process, patent flour is produced with a moisture content which ranges from about 13 to 14%, and whole wheat flour is produced with a moisture content from about 12 to 13½%.

10. Packaging of flour by plaintiffs is totally mechanized. This equipment is expensive and sophisticated. Weight control procedures have been established and are employed by each plaintiff to make sure that all packages of flour produced are full weight at the time they leave the mill.

11. To insure that plaintiffs' weight control procedures are maintained, the packaging machines are constantly supervised. In addition, plaintiffs stamp a code number on each package. By referring to the code number it is possible to determine when and where that package of flour was packed. Explanations of the code numbers are available to interested weights and measures inspectors; once the code is ascertained, the quality-control records on that package, which include packing moisture levels, can be obtained.

12. Plaintiffs recognize that the net weight of packages of flour which they have placed in commerce may fluctuate as a result of atmospheric conditions over which they have no control. However, such fluctuations due to absorption or evaporation of moisture content do not vary the quantity of dry ingredients in the package nor do they affect the flour's nutritional value. Moreover, any deficiency in the flour's moisture content is compensated for

by the universal practice of adding liquid to the flour when it is used.

13. Thus, because of the nature of wheat flour and the requirements of the milling and packaging processes, certain variations from the stated quantity of contents may occur as the result of loss or gain of moisture during the course of good distribution practice and/or unavoidable deviations in good manufacturing practice. However, such variations are permitted by federal statute and regulation because of an awareness of the inevitable variations in packing and weighing of foods and of the moisture loss or gain of certain goods which occurs in good distribution practice.

14. The Federal Food, Drug and Cosmetic Act prohibits the introduction of "misbranded food" into interstate commerce, 21 U.S.C. §331. This act then goes on to state that food shall be deemed misbranded "unless it bears a label containing . . . (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: Provided, that under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations . . ." 21 U.S.C. §343(e).

15. The Fair Packaging and Labeling Act provides that no person "shall distribute . . . in commerce any packaged consumer commodity unless in conformity with regulations which shall be established by the promulgating authority . . . which shall provide that . . . (2) The net quantity of contents (in terms of weight, measure, or numerical count) shall be separately and accurately stated in a uniform location upon the principal display panel of that label . . ." 15 U.S.C. §1453(a). §1454(a) of the Act vests the authority to promulgate regulations in the Secretary of Health, Education and Welfare with respect

to consumer commodities defined by the Food, Drug and Cosmetic Act as foods, drugs, devices or commodities. The Fair Packaging and Labeling Act further provides "nothing contained in this chapter shall be construed to repeal, invalidate or supersede . . . (b) the federal Food, Drug and Cosmetic Act . . ." 15 U.S.C. §1460.

16. Acting pursuant to the grants of power contained in the Federal Food, Drug and Cosmetic Act (21 U.S.C. §§341 and 371) and the Fair Packaging and Labeling Act (15 U.S.C. §1454 the following regulation was duly promulgated:

"The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large." [21 C.F.R. §1.8b (q)]

17. The labeling of all wheat flours manufactured, packaged, sold and shipped by each plaintiff is performed in accordance with the applicable requirements of the Federal Food, Drug and Cosmetic Act, the Fair Packaging and Labeling Act and the regulations promulgated thereunder by the Secretary of Health, Education and Welfare.

18. The Department has taken the position that it has the authority to establish its own standards and procedures to regulate the retail sale of wheat flour within the City of New York. Thus, where packages of wheat flour are offered for retail sale in the City and, at the time said packages are inspected by agents of the Department in the various retail stores, are determined to weigh less

than the stated net weight, it has been and continues to be the practice of the Department to order off-sale and confiscate said packages and cite the retail merchants for criminal violations. Such actions are taken by the Department without regard to the cause of the variations from stated net weight in the individual wheat flour package. Indeed, the Department makes no attempt to ascertain the cause of the underweight condition of any package of wheat flour. By employing such arbitrary procedures, defendant and her agents totally ignore the likelihood that the cited underweight condition is due to the unavoidable loss of moisture during the course of good distribution practice or to unavoidable deviations in good manufacturing practice, either of which is expressly recognized under federal law as justifying variations below stated net weight.

19. In support of its position set forth in paragraph 18 hereof, the Department relies on the Administrative Code of the City of New York, Chapter 36, Title A §833-16.0 which states in pertinent part that:

"It shall be unlawful to sell or offer for sale any commodity or article of merchandise, at or for a greater weight or measure than the true weight or measure thereof . . ."

20. The inspectors of the Department, the administrative practices they follow, and the methods they employ in the performance of their duties are subject to the general supervision and control of defendant, the Commissioner of Consumer Affairs for the City of New York.

21. On January 17, 1973, February 21, 1973, and March 8, 1973, inspectors of the Department inspected and weighed packages of wheat flour of plaintiffs, or some of them, which were exposed for retail sale on the shelves

of a Bronx Consumers Co-Op supermarket at 50 Van Cortlandt Avenue West, Bronx, a Great Atlantic and Pacific Tea Co. supermarket at 41-25 Greenspan Avenue, Queens, and a Pantry Pride supermarket at 187-04 Horace Harding Expressway, Queens. With respect to said packages of wheat flour milled and packaged by plaintiffs, they are informed and believe the following:

(a) that defendant's inspectors, or some of them, found that at the time of their inspections the net weights of some of the packages were less than stated on their labels, the net weights of other packages were the same as stated on the labels, and the net weights of still other packages were greater than the amounts stated on their labels;

(b) that in each instance involving plaintiffs' packages of wheat flour the inspection by defendants' agents consisted of nothing more than determining the net weight of the contents of the package at the time of the inspection;

(c) that none of defendant's inspectors ascertained or attempted to ascertain the original weight of the net contents of any of the packages or what might have caused variations from the stated net weights or whether plaintiffs had or had not engaged in "good distribution practices";

(d) that, instead, the inspectors arbitrarily filed complaints against the retailers in whose stores the challenged wheat flour packages of plaintiffs were located. Said complaints alleged that offering certain of plaintiffs' wheat flour packages for sale at a greater weight than the true weight thereof constituted a violation of §833-16.0 of the Administrative Code of the City of New York, Chapter 36, Title A; and

(e) that defendant's agents arbitrarily and unlawfully condemned and ordered off-sale all packages of plaintiffs' wheat flour which defendant's agents contended were

underweight. Each and every action of defendant's agents set forth in subparagraphs (a)-(e) occurred without plaintiffs being afforded an opportunity to object to the procedures employed or to determine the validity of the inspectors' orders.

22. As a consequence of such off-sale orders by defendant's inspectors, the cited retailers, all customers of plaintiffs, removed the challenged wheat flour packages from their shelves. Although only some of the affected retailers destroyed the challenged wheat packages, each sought reimbursement from plaintiffs for the cost of the challenged packages. Moreover, affected retailers informed plaintiffs that they would look to plaintiffs for reimbursement of any fine they might be required to pay. In order to retain the valuable good will of their customers, plaintiffs agreed to reimburse said retailers.

23. The aforementioned complaints which defendant's inspectors issued were considered by the Department on April 18, 1973, and an official recommendation was made with respect to compromising same. The proffered compromise was rejected and all administrative remedies with respect to the alleged violations were thereby exhausted.

24. Plaintiffs believe and allege that the administrative practice of the Department in condemning and ordering removed from retail grocers' shelves packages of wheat flour which its inspectors allege to be short-weight without affording the grocer, distributor or packers an opportunity to contest the findings of such inspector is generally followed by the Department with the sanction and approval of defendant. Plaintiffs further believe and allege that the action of the inspectors in limiting their inspection to a mere weighing of the net contents of the wheat flour packages without making any effort to ascertain the conditions to which such packages have been exposed and without making any effort to ascertain

whether the net contents of such packages were equal to or in excess of the stated net weight at the time of packing and shipping is also a practice generally followed by inspectors under the direction and control of defendant.

25. There is available to the inspectors a reliable and widely recognized method of ascertaining the original weight of a package of flour. To do so one must first determine the present weight of the flour, the present moisture content of the flour and the moisture content of the flour at the time it was packed. Once these figures are ascertained the weight of the contents at the time of packing can be readily computed.

26. Plaintiff General Mills was able to recover some of the packages which an inspector found to be short-weight at the Pantry Pride supermarket at 187-04 Horace Harding Expressway on March 8, 1973. General Mills submitted said packages to the United States Testing Company of Hoboken, New Jersey, an independent testing laboratory, for the purpose of having the company determine the weight and moisture content of the flour in said packages. United States Testing has submitted to plaintiff General Mills its report dated April 3, 1973. The report, a copy of which is annexed hereto as Schedule A, deals with three 5-pound bags of Gold Medal All Purpose Enriched Flour; three 5-pound bags of Gold Medal Unbleached Enriched Flour; and seven 5-pound bags of Gold Medal Whole Wheat Flour, all of which were inspected and ordered off-sale as underweight by defendant's representative at the Pantry Pride supermarket, 187-04 Horace Harding Expressway on March 8, 1973. A comparison of General Mills' plant records with the test results obtained by United States Testing Company reveals that the wheat flour packages in question had lost moisture equal to or in excess of the variation in weight from that declared on the packages. None of the other packages

inspected by defendant's agents was available for testing by United States Testing Company.

27. Based on the facts disclosed by the United States Testing Company's report, and using General Mills' plant records with respect to moisture content at the time of packing, plaintiff General Mills has prepared Schedule B annexed hereto and made a part hereof. Schedule B demonstrates that each package of General Mills flour available for testing from the lot of 24 bags ordered off-sale at Pantry Pride, 187-04 Horace Harding Expressway on March 8, 1973, bore a label containing an accurate statement of the quantity of contents in terms of weight when packed by plaintiff General Mills.

28. Plaintiffs allege that §833-16.0 of the Administrative Code of the City of New York, Chapter 36, Title A, and the enforcement thereof in the manner hereinabove set forth and the practice of defendant, her deputies, agents and inspectors in conjunction with such enforcement as hereinabove set forth and the actions, harassments, and confiscations which continued enforcements will undoubtedly occasion, cause and will continue to cause irreparable loss and damage to plaintiffs by reason of loss of good will, loss of reputation, subjection to harassment, repeated prosecution, repeated interference with the legitimate conduct of their businesses and the substantial expense thereof and that all of the foregoing constitute:

(a) an unconstitutional taking of plaintiffs' property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States;

(b) an unlawful attempt on the part of the City of New York to regulate interstate commerce and an unlawful and unreasonable burden on interstate commerce in that §833-16.0 of the Administrative Code of the City of New York by its terms and as implemented by the City conflicts with

the provisions of the Federal Food, Drug and Cosmetic Act and the Fair Packaging and Labeling Act pursuant to Congress' power to regulate interstate commerce under Article 1, Section 8, Clause 3 of the Constitution of the United States;

(c) an invalid encroachment on an area necessarily and expressly preempted by the Federal Government in that §833-16.0 is in addition to, different from, and in conflict with laws of the United States and regulations duly promulgated thereunder which are the supreme law of the land.

29. By the aforesaid unlawful acts of the inspectors under the control of the Department of Consumer Affairs, defendant has caused each plaintiff to suffer irreparable injury to its reputation among retailers and the consuming public. Defendant continues and threatens to continue to act pursuant to §833-16.0 in the manner heretofore outlined which actions and future actions will cause each plaintiff monetary damage and further grave and immediate injury of an irreparable nature unless and until restrained by this court. Plaintiffs do not have available to them an adequate remedy at law. Moreover, pecuniary compensation will not afford relief for the damage to plaintiffs' businesses which is to be anticipated should defendant and her agents be permitted to continue to engage in the practices and procedures set forth in paragraphs 18, 21, and 24 hereof.

30. An actual controversy now exists between each plaintiff and the defendant with respect to the legal relations of the parties, the rights of each plaintiff under the Constitution of the United States under the aforesaid federal statutes and regulations, and under the Administrative Code of the City of New York. The value to each plaintiff of its right to be free of the aforesaid requirements imposed by defendant exceeds the sum of \$10,000, exclusive of interest and costs.

WHEREFORE, each plaintiff prays judgment as hereinafter set forth:

(a) declaring that the imposition of §833-16.0 of the Administrative Code of the City of New York, Chapter 36, Title A on each plaintiff's said flours is unlawful and beyond defendant's authority for each and every ground alleged in paragraph 28 of the complaint;

(b) temporarily, during the pendency of this action, and permanently restraining and enjoining defendant, her deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with her,

(1) from imposing the said §833-16.0 of the Administrative Code of the City of New York, Chapter 36, Title A, individually and collectively on each plaintiff's wheat flours; and

(2) from imposing on each plaintiff's wheat flours any labeling requirement which is unconstitutional or which is in addition to, different from or in conflict with requirements of the Federal Food, Drug and Cosmetic Act and/or the Fair Packaging and Labeling Act; and

(c) for costs of suit incurred by each plaintiff; and

(d) for such other and further relief which the Court may deem just and proper.

WILLIAM J. CONDON
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OF COUNSEL:

CARPENTER, BENNETT & MORRISSEY
744 Broad Street
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SCHEDULE A
(Annexed to Foregoing Complaint)
REPORT OF TEST APRIL 3, 1973

CLIENT: General Mills Incorporated
James Ford Bell Technical Center
9000 Plymouth Avenue North
Minneapolis, Minnesota 55427
Attn: Mr. D. Colpitts

SUBJECT: Thirteen (13) samples submitted and identified by the client as:
3 Bags—Gold Medal All Purpose Enriched Flour
3 Bags—Gold Medal Unbleached Enriched Flour
7 Bags—Gold Medal Whole Wheat Flour

Individual identification of the samples was made as follows:

1. Gold Medal All Purpose Enriched Flour—identified by code number found on bags.
2. Gold Medal Unbleached Enriched Flour—All numbers found to be the same therefore samples identified by U.S. Testing Company as 1, 2, and 3.
3. Gold Medal Whole Wheat Flour—All numbers found to be the same, therefore samples identified by U.S. Testing Company as A thru G inclusive.

Authorization: Letter dated March 27, 1973
PURPOSE—To determine:

- A) The gross weight of each full bag
- B) The tare weight of the packaging material and insert for each bag
- C) The moisture content of each sample

Signed for the Company by:

/s/ Gene R. Epstein
For M. A. Schmutzter

PROCEDURES:

The gross weight of each bag was determined by weighing the samples on a triple beam balance with a 2610 grams maximum load capacity. The outside of each sample bag was brushed to remove any flour which may have adhered to the outside of the bag. The sample was then transferred to a suitable container. The sample bag and insert were then cleaned of adhering flour with a dry stream of air and finally by brushing. The bag and insert were then weighed on a Mettler overhead pan balance (800 gram capacity) to obtain a tare weight. The moisture content of the samples was determined in accordance with AOAC (Association of Official Analytical Chemists) Method 14.004 Air Oven Method in duplicate. Approximately 2 grams of the sample was placed in a tared aluminum dish (with cover). The dish, cover and sample were then dried in a ventilated oven at $130^{\circ}\pm 3^{\circ}\text{C}$ for one hour. After one hour the dish and contents were transferred to a dessicator and weighed as soon as room temperature was obtained. The % moisture was then calculated.

RESULTS:

Gold Medal All Purpose Enriched Flour

Identifi- cation	Gross Wt.	Tare Wt.	Net Wt.	% Moisture	
				1)	2)
J 302E1	2,238	21	2,217	10.1	10.1
231L°	2,250	19	2,231	10.0	10.0
G 213L	2,253	23	2,230	10.4	10.4

°No insert

Gold Medal Unbleached Enriched Flour

Identifi- cation	Gross Wt.	Tare Wt.	Net Wt.	%
	gms	gms	gms	Moisture
1	2,238	23	2,215	1) 10.2
				2) 10.0
2	2,244	24	2,220	1) 10.2
				2) 9.9
3	2,213	23	2,190	1) 10.0
				2) 10.0

Gold Medal Whole Wheat Flour

Identifi- cation	Gross Wt.	Tare Wt.	Net Wt.	%
	gms	gms	gms	Moisture
A ^o	2,242	24	2,218	1) 9.4
				2) 9.4
B	2,241	24	2,223	1) 9.4
				2) 9.1
C	2,234	24	2,210	1) 9.5
				2) 9.4
D	2,252	23	2,229	1) 9.4
				2) 9.5
E	2,244	24	2,220	1) 9.6
				2) 9.4
F	2,235	23	2,212	1) 9.2
				2) 9.3
G	2,245	25	2,220	1) 9.5
				2) 9.8

^oBag ripped on side

SCHEDULE B
(Annexed to Foregoing Complaint)

G.M.I. FLOUR SAMPLES PICKED UP AT PANTRY PRIDE
 FROM LOT OF 24 BAGS CONDEMNED FOR "SHORT WEIGHT"
 NOTICE OF VIOLATIONS, NO. 9931, DELIVERED 3/27/73 TO U.S. T.

Brand	Sample Code and Identification	Gross Weight U.S. Test. Co.	Tare Weight U.S. Test. Co.	Net
GMKT All Purpose	J302E1	2238 g.	21 g.	2217 g. (
GMKT All Purpose	231L	2250 g.	19 g.	2231 g. (
GMKT All Purpose	C213L	2253 g.	23 g.	2230 g. (
GM Unbleached	E216E1 (1)	2238 g.	23 g.	2215 g. (
GM Unbleached	E216E1 (2)	2244 g.	24 g.	2220 g. (
GM Unbleached	E216E1 (3)	2213 g.	23 g.	2190 g. (
GM Whole Wheat	208H (A)	2242 g.	24 g.	2218 g. (
GM Whole Wheat	C208H (B)	2247 g.	24 g.	2223 g. (
GM Whole Wheat	208H (C)	2234 g.	24 g.	2210 g. (
GM Whole Wheat	8H (D)	2252 g.	23 g.	2229 g. (
GM Whole Wheat	(No code) (E)	2244 g.	24 g.	2220 g. (
GM Whole Wheat	208H (F)	2235 g.	23 g.	2212 g. (
GM Whole Wheat	208H (G)	2245 g.	25 g.	2220 g. (

*First letter of code is missing which designates month. For calculation of net weight, use average packing moisture for this grade over period 7/1/72 - 2/28/73.

**No code present on bag. For calculation of net weight at time of packing, use average packing moisture for this grade since we started producing it 7/25/72. Moisture test range of packing is calculated using minimum moisture of the range, 11.9%.

, 187-04 HORACE HARDING BLVD., QUEENS, NEW YORK
3/8/73 BY CONSUMERS AFFAIRS DEPT. OF NEW YORK CITY
ESTING CO., HOBOKEN, N.J. FOR WEIGHT AND MOISTURE TESTING

Weight	Moisture Content U.S. Test. Co. (percent)	Moisture Content When Packed (%)	Net Weight at Time of Packing
4.8876 lb.)	10.1	13.8	5.0973 lbs. (5# 1-9/16 oz.)
4.9185 lb.)	10.0	13.7*	5.1294 lbs. (5# 2-1/16 oz.)
4.9163 lb.)	10.4	14.0	5.1220 lbs. (5# 1-15/16 oz.)
4.8832 lb.)	10.1	14.15	5.1135 lbs. (5# 1-13/16 oz.)
4.8943 lb.)	10.05	14.15	5.1280 lbs. (5# 2-1/16 oz.)
4.8281 lb.)	10.0	14.15	5.0615 lbs. (5# 1 oz.)
4.8899 lb.)	9.4	12.75	5.0776 lbs. (5# 1-4/16 oz.)
4.9009 lb.)	9.25	12.75	5.0974 lbs. (5# 1-9/16 oz.)
4.8722 lb.)	9.45	12.75	5.0564 lbs. (5# 14/16 oz.)
4.9141 lb.)	9.45	12.75	5.0999 lbs. (5# 1-9/16 oz.)
4.8943 lb.)	9.5	13.0**	5.0911 lbs. (5# 1-7/16 oz.)
4.8766 lb.)	9.25	12.75	5.072 lbs. (5# 1-2/16 oz.)
4.8943 lb.)	9.65	12.75	5.0681 lbs. (5# 1-1/16 oz.)

tion of net weight at time of packing 13.7% moisture was used which
/73.

cking 13.0% moisture was used which is average packing moisture for
age since that time has been 11.9% to 13.6%. When net weight at time
net weight at time of packing is still well above declared weight.

**Plaintiff's Notice of Motion for a
Preliminary Injunction
(Filed July 6, 1973)**

PLEASE TAKE NOTICE that on July 16, 1973 at 10:00 o'clock in the forenoon or as soon thereafter as counsel may be heard, the undersigned attorney for plaintiffs, General Mills, Inc., The Pillsbury Company, and Seaboard Allied Milling Corporation, will apply to the Honorable Constance Baker Motley, or to such other Judge as may be sitting to hear motions in the United States District Court for the Southern District of New York at the Federal Building in Foley Square, New York, New York, for a preliminary injunction during the pendency of this action restraining and enjoining defendant, Betty Furness, Commissioner of the Department of Consumer Affairs, City of New York, her deputies, inspectors, officers, agents, servants, employees, attorneys and other persons in active concert or participation with her

(1) from imposing the said §833-16.0 of the Administrative Code of the City of New York, Chapter 36, Title A, individually and collectively on each plaintiff's wheat flour;

(2) from imposing on each plaintiff's wheat flours any labeling requirement which is unconstitutional or which is in addition to, different from or in conflict with requirements of the Federal Food, Drug and Cosmetic Act and/or the Fair Packaging and Labeling Act; and

For such other and further relief as the Court may deem just and proper.

In support of its motion for a preliminary injunction, plaintiffs will rely upon the affidavits annexed hereto and

*Plaintiff's Notice of Motion for
Preliminary Injunction*

27a

made a part hereof and upon the brief submitted herewith.

/s/ William J. Condon
WILLIAM J. CONDON
Attorney for Plaintiffs
420 Lexington Avenue
New York, New York 10017
532-3388

OF COUNSEL:
CARPENTER, BENNETT & MORRISSEY

744 Broad Street
Newark, New Jersey 07102
201 622-7711

Answer
(Filed October 5, 1973)

Defendant BETTY FURNESS, Commissioner, Department of Consumer Affairs, City of New York, in answer to the complaint:

1. Denies each and every allegation contained in paragraphs 4, 21(e), 28, 28(a), 28(b), 28(c) and 30 of the complaint.
2. Denies knowledge or information sufficient to form a belief as to the truth of each and every allegation contained in paragraphs 5, 7, 8, 9 and 17 of the complaint.
3. Denies each and every allegation contained in paragraph 3 of the complaint except admits that this action is between citizens of different states.
4. Denies so much of paragraph 6 of the complaint as may imply that the standard of identity for wheat flour set forth in 21 C.F.R. §15.1 authorizes unreasonable weight shortages in individual wheat flour packages, whether or not said shortages are caused by loss of moisture, and deny so much as may imply that an individual package of wheat flour will necessarily vary in weight depending upon the relative humidity to which it has been exposed.
5. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 10 and 11 of the complaint except denies so much of said paragraphs as may imply that plaintiffs' weight control procedures are adequate to avoid unreasonable variations from stated weight in individual packages.
6. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained

in paragraph 12 of the complaint except denies so much of said paragraph as may imply that the practice of adding liquid to flour when used compensates consumers for unreasonable weight shortages from stated weight on individual packages of plaintiffs' wheat flours.

7. Denies so much of paragraph 13 of the complaint as may imply that certain variations other than reasonable variations from stated weight of an individual package are permitted by federal statute and regulation, and so much of said paragraph as may imply that moisture loss or gain is inevitable in good distribution practice, and so much of said paragraph as may imply that moisture loss or gain by plaintiffs wheat flours necessarily occurs as a result of good distribution practice or unavoidable deviations in good manufacturing practice.

8. Denies so much of paragraph 14 of the complaint as differs from 21 U.S.C. §331, 343(e).

9. Denies so much of paragraph 16 of the complaint as differs from 21 C.F.R. §1.8b(q).

10. Denies so much of paragraph 18 of the complaint as may imply that the Department's standards and procedures for determining short weight violations are in conflict with the standards and procedures under federal law and regulation and so much of said paragraph as alleges that it is the practice of the Department to confiscate or issue criminal violations for failure to comply with such standards and procedures.

11. Denies so much of paragraph 19 of the complaint as may allege that paragraph 18 sets forth the Department's position.

12. Denies upon information and belief so much of paragraph 21(a) of the complaint as alleges that defen-

dant's inspectors found any packages other than short weight packages.

13. Denies that defendant or the inspectors of her department have a duty to make any of the determinations set forth in paragraph 21(c) of the complaint once it is determined that the variation from stated weight is unreasonable.

14. Denies so much of paragraph 21(d) of the complaint as characterizes as arbitrary the violations issued against the retailers.

15. Denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the complaint except denies that "off-sale orders" were made by defendant's inspectors.

16. Denies any knowledge or information sufficient to form a belief as to the truth of so much of paragraph 24 of the complaint as asserts plaintiffs' belief, and denies so much of said paragraph as alleges that the Department condemns and orders shortweight wheat flour packages removed from grocers' shelves or that grocers, packers or distributors are denied an opportunity to contest the violations issued, and denies so much of said paragraph as may imply that defendant or inspectors of her Department have a duty to or in fact could objectively ascertain the conditions to which unreasonably shortweight packages have been exposed or the weight of said packages at the time of packing and shipping.

17. Denies so much of paragraph 25 of the complaint as characterizes the method described as reliable and widely recognized and so much as may purport to allege that it is possible for inspectors independently and objectively to determine the moisture content of flour at the time it was packed.

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 26 and 27 of the complaint except denies so much of said paragraphs as may imply that unreasonable variations from stated weight are permitted by federal or local law when caused by moisture loss.

19. Denies each and every allegation contained in paragraph 29 of the complaint except admits that defendant is enforcing and will continue to enforce the provisions of §833-16.0 of the Administrative Code of the City of New York.

FIRST DEFENSE

20. The regulation of the weights and measures of commodities sold in New York City including prepackaged flour, has been traditionally of local concern.

21. Section 2203(b) of the New York City Charter empowers the Commissioner of Consumer Affairs to "enforce all laws in relation to weights and measures."

22. Chapter 36, Title A, §833-16.0 of the Administrative Code of the City of New York ("§833-16.0") entitled "Sale by true weight or measure required" makes it

"unlawful to sell or offer for sale any commodity or article of merchandise at or for a greater weight or measure than the true weight or measurement thereof; . . ."

23. New York City is not precluded by the Fair Packaging and Labeling Act or the Federal Food, Drug and Cosmetic Act from regulating the weights of packaged flour sold in New York City, pursuant to §833-16.0.

24. The Fair Packaging and Labeling Act expressly allows the enforcement of local laws regulating weights and

measures which are not in conflict with it. Section 1461 thereof provides (15 U.S.C. §1461):

"Effect upon State law

It is hereby declared that it is the express intent of Congress to supercede any and all laws of the States or political subdivisions thereof insofar as they may now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of Section 1453 of this title or regulations promulgated pursuant thereto."

25. The Federal Food, Drug and Cosmetic Act makes no reference to local regulation of the weights of commodities such as flour.

26. The Federal Food, Drug and Cosmetic Act prohibits "misbranded food" from being introduced or delivered for introduction into interstate commerce [28 U.S.C. §331(a)].

27. A packaged food is considered "misbranded," under 21 U.S.C. §343(e).

"... unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: Provided, that under clause (2) of this subsection reasonable variations shall be permitted, and exemptions as to small packages shall be established by regulations prescribed by the Secretary."

28. In enforcing the provisions of §883-16.0, defendant permits the same reasonable variations in the labeling of

the weight of packaged flour as are permitted under the applicable federal laws.

29. Pursuant to the grants of power in the Federal Food, Drug and Cosmetic Act (21 U.S.C. §§341, 371) and the Federal Fair Packaging and Labeling Act (15 U.S.C. §1454), the following regulation was duly promulgated:

"The declaration of net quantity of contents shall express an *accurate* statement of the quantity of contents of the package. *Reasonable variations* caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. *Variations from stated quantity of contents shall not be unreasonably large.*" (21 C.F.R. §1.8b[q]) (emphasis added).

30. The National Bureau of Standards, United States Department of Commerce, published Handbook 67, entitled "Checking Prepackaged Commodities, A Manual for Weights and Measures Officials," a copy of which is attached hereto as defendant's Exhibit "A." (A copy of Handbook 67 appears as Ex. P3, JA352a). Handbook 67, as its preface (p. iii) states, is "designed to present in compact form comprehensive guides for State and local weights and measures officials. This Handbook presents an operational guide for the control, under law, of prepackaged commodities."

31. Handbook 67, at pp. 7-8, sets forth guidelines to be used by weights and measures personnel in determining the unreasonableness of the variation from stated weight ("error") on individual packages, and the procedures to be followed in recording the variations. The defendant and the inspectors of her Department follow these guidelines and procedures.

32. The Handbook, at p. 8, sets forth a table entitled "Unreasonable Minus or Plus Errors" which is "suggested for the determination of the 'reasonableness' of errors in individual packages," including packages of flour. According to the Hankbook, said table

"is suggested for both random and standard-pack packages that contain items of such a nature that they are susceptible of *precise weight control*. Standard-pack packages of such commodities as apples, potatoes, and the like *cannot be controlled as precisely as can packages of commodities such as* peas, corn, sugar, salt, and *flour*; consequently the inspector must exercise greater liberality in the determination of the reasonableness of errors in packages containing large individual elements (emphasis added).

(It will be noted that the suggested plus allowances are twice the suggested minus allowances at each 'labeled quantity.' This is an acknowledgment that packers must be allowed to overfill such packages as are susceptible of moisture loss.)" (Handbook 67, pp. 7-8).

33. The fifth item on said table sets forth the unreasonable minus or plus errors on packages of labeled quantity of 4 to 7 pounds. For such packages, a minus error greater than 3/8 of an ounce is unreasonable.

34. Section 833-16.0 of the Administrative Code is applied and enforced according to the standards and guidelines set forth in Handbook 67. Prior to 1967, the Handbook was formally used as a reference and guide by the Department. Since 1967 and presently, the standards and guidelines set forth in Handbook 67, including the standards for determining unreasonableness of variations from stated weight of prepackaged commodities, are followed by the Department and continue to be followed.

35. The shortweight violations issued to retailers of plaintiffs' flours by defendant and her agents have been for many years and continue to be ascertained according to the standards for unreasonableness of variations from stated weight set forth in Handbook 67.

36. On January 17, 1973, three weights and measures inspectors of the Department of Consumer Affairs visited the Bronx Consumers Co-op, 50 Van Cortlandt Avenue, West Bronx, New York. They weighed the net contents of 21 packages of plaintiff Pillsbury's bleached and unbleached flour whose stated net weights were each five pounds. Of the contents of packages inspected, 21 were found to weigh unreasonably less than the stated five-pound weight. The smallest minus error was 14/16, or 7/8 of an ounce; the greatest minus errors were 40/16, or 2-1/2 ounces. (Minus errors of more than 3/8 of an ounce are unreasonable.) The inspectors advised the retailer to remove the 21 shortweight packages from sale. A copy of the package control report containing the results of the inspection is attached hereto as defendant's Exhibit "B". This report shows that each of the minus errors was circled to indicate its unreasonableness, in accordance with the procedures set forth in Handbook 67, p. 7. Each error was substantially in excess of Handbook 67's standard of unreasonableness.

37. On February 21, 1973, three weights and measures inspectors of the Department of Consumer Affairs visited the Atlantic and Pacific Tea Co., 41-25 Greenspan Avenue, Queens, New York. They weighed the net contents of 19 packages of plaintiff General Mills' whole wheat flour whose stated net weights were each five pounds. Of the packages inspected, the contents of 19 were found to weigh unreasonably less than the stated five-

pound net weight. The smallest minus error was 27/16, or 1-11/16, ounces; the greatest minus error was 45/16, or 2-13/16, ounces. (Minus errors of more than 3/8, or 6/16, ounce are unreasonable.) The inspectors advised the retailer to remove the 19 shortweight packages from sales. A copy of the package control report containing the results of the inspection is attached hereto as defendant's Exhibit "C". This report shows that each of the minus errors was circled, in accordance with the procedures set forth in Handbook 67, p. 7, to indicate unreasonableness.

38. On March 8, 1973, two weights and measures inspectors of the Department of Consumer Affairs visited the Pantry Pride, 187-04 Horace Harding Expressway, Queens, New York. They weighed the net contents of 25 packages of plaintiff General Mills' bleached, unbleached and whole wheat flour and 14 packages of plaintiff Pillsbury's all-purpose flour, each of whose stated net weight was five pounds.

39. Of the 25 inspected packages packed by plaintiff General Mills, the contents of 24 were found to weigh unreasonably less than the stated five-pound net weight. The smallest minus error was 5/16 ounce; the next smallest minus error was 11/16 ounce; the greatest minus error was 40/16, or 2-1/2, ounces. (Minus errors of more than 3/8 ounce are unreasonable.) The inspectors advised the retailer to remove the 24 shortweight packages from sale. A copy of the package control report containing the results of the inspection is attached hereto as defendant's Exhibit "D". This report shows that all except the 5/16 ounce minus error were circled, to indicate their excess over Handbook 67's standard of unreasonableness, in accordance with the procedures set forth in the Handbook.

40. Of the 14 inspected packages packed by plaintiff Pillsbury, the contents of 14 were found to weigh unreasonably less than the stated five-pound net weight. The smallest minus error was 9/16 ounce; the greatest minus error was 40/16, or 2-1/2, ounces. (Minus errors of more than 3/8 ounce are unreasonable.) The inspectors advised the retailer to remove the 14 shortweight packages from sale. A copy of the package control report containing the results of the inspection is attached hereto as defendant's Exhibit "E". This report shows that each of the minus errors was circled, to indicate that it exceeds Handbook 67's standard of unreasonableness, in accordance with the procedures set forth in the Handbook.

41. On April 18, 1973, informal Departmental hearings were held to consider the violations described in paragraphs 36-40. At the hearings, William J. Condon, attorney for the plaintiffs herein, appeared. Penalties were recommended by the hearing officer at the conclusion of the hearing, to be paid by each of the three retailers, pursuant to Chapter 36, Title A, §833-22.0 of the Administrative Code. Penalties, ranging from \$10.00 to \$25.00, were recommended for each package of unreasonably shortweight flour which had been offered for sale. The penalties have not been paid.

42. It is apparent from the foregoing that the enforcement of §833-16.0 is compatible with the requirements imposed by federal statute and regulation.

43. The defendant is not pre-empted by federal statute or regulation from enforcing §833-16.0, nor do the acts of the defendant or her agents or the standards and procedures employed by them in determining and issuing shortweight flour violations under §833-16.0 conflict with federal statute or regulation or impose an undue burden upon interstate commerce.

SECOND DEFENSE

44. Only persons selling or offering for sale shortweight commodities within the City of New York are subject to the issuance of violations or liable for the payment of penalties assessed under §833-16.0. The plaintiffs herein do not sell or offer flour for sale within the City of New York, not have they been issued any violations of §833-16.0, nor are they liable for the payment of penalties assessed thereunder. In short, plaintiffs are not subject to the provisions of §833-16.0.

45. Plaintiffs lack standing to bring this action.

THIRD DEFENSE

46. Defendant's reasonable regulation and control of the shortweight flour sold or offered for sale by retailers in New York City and manufactured and packed by plaintiffs are a traditional and long recognized permissible exercise of local police power.

47. The requirements of local law and the procedure followed by defendant are designed to protect the public against fraud and do not violate plaintiffs' due process rights.

FOURTH DEFENSE

48. Plaintiffs predicate jurisdiction of their claims upon 28 U.S.C. §§1331 and 1332(a), both of which require that the matter in controversy exceed the sum or value of \$10,000.

49. The complaint does not set forth any factual allegations showing that the matter in controversy exceeds the sum or value of \$10,000.

50. Plaintiffs further predicate jurisdiction of their claims upon 28 U.S.C. §1337, which provides for original jurisdiction in the United States District Courts

"of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

51. The plaintiffs action does not arise under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

52. Plaintiffs' complaint raises no substantial federal question.

53. Plaintiffs have failed to show that this Court has jurisdiction over the claims alleged in their complaint.

WHEREFORE, the complaint should be dismissed with costs.

Dated: New York, New York

October 4, 1973

NORMAN REDLICH
Corporation Counsel of the City
of New York
Attorney for Defendant
2711 Municipal Building
New York, New York 10007

By: /s/ Jane Fankhanel
Asst. Attorney
Tel: 566-3039

40a

Answer

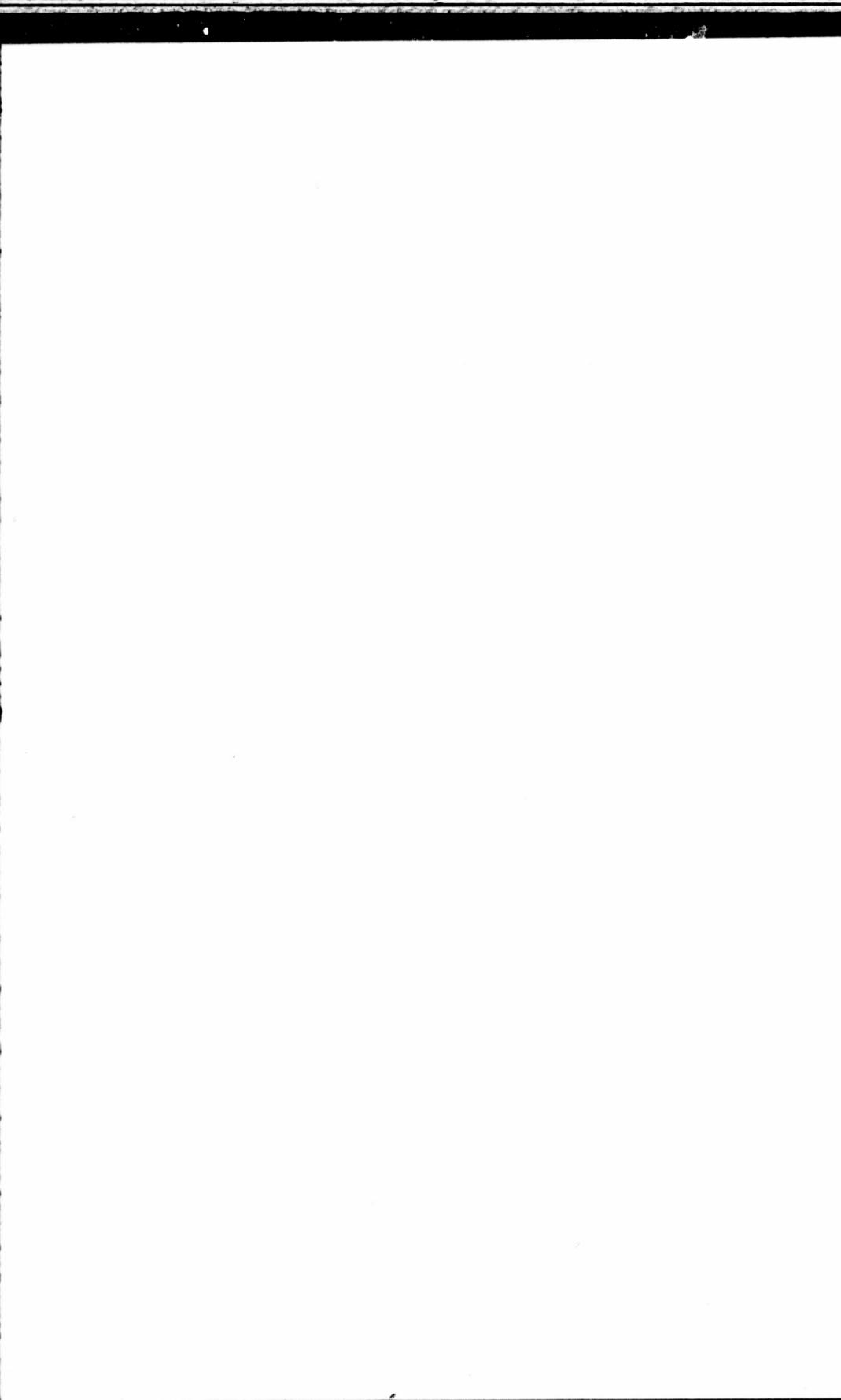
DEFENDANT'S EXHIBIT "B"
(Annexed to Foregoing Answer)



NEW YORK CITY DEPARTMENT OF TRADE
CONSUMER LAW INSPECTION UNIT
60 Lafayette Street
New York, N. Y. 10013

PACKAGE CONTROL REPORT

NAME	BROOKLYN CALICOERS CO., INC.	DBA	DATE	1-17-73
ADDRESS	50 VAN CORTLANDT AVE. W	6X	LAPELLED QUANTITY	5265
TYPE OF BUSINESS	S/M	ITEM	11462	ITEM IN
COMMODITY	UN Bleached White Flours + Bleached	ITEMS	27	PLUS
BRAND	PILLSbury	ITEMS	32	minus
PACKER OR DISTRIBUTOR	The Pillsbury Company	ITEMS	20	
LOT OR CODE	31W778	ITEMS	32	
NET WEIGHT	5 lbs	ITEMS	21	
TARE WEIGHT	14	ITEMS	30	
GROSS WEIGHT OF CORRECTLY	5 16	ITEMS	22	
FILLED CONTAINER	5 16	ITEMS	20	
EQUIPMENT USED IN CHECKING	Equal arm balance	ITEMS	23	
INSPECTION CERTIFICATE	B15C75	ITEMS	24	
VIOLATION CERTIFICATE	934.1	ITEMS	24	
RETURN DATE	Feb 22, 1973	ITEMS	23	
NAME OF OWNER OR	ARTHUR KRECH	ITEMS	23	
MANAGER (PRINT)	ARTHUR KRECH	ITEMS	22	Bleached
RECEIPT OF REPORT		ITEMS	24	
ACKNOWLEDGE		ITEMS	24	
CALCULATIONS, REARMS AND/OR INSTRUCTIONS:				
WT. OF STANDARD SLVR. PLATE & COMMODITY	(690)	ITEMS	24	
WT. OF STANDARD & SLICKER PLATE	(690)	ITEMS	24	
Advised to remove 21 lbs of		ITEMS	23	
weight package from sale		ITEMS	24	
INSPECTOR	Neufourman - Kleinman	ITEMS	20	
		ITEMS	14	
		ITEMS	16	
		ITEMS	11	
		ITEMS	20	
		ITEMS	14	
		ITEMS	22	
		ITEMS	23	
		ITEMS	24	
		ITEMS	25	
		ITEMS	16	
		ITEMS	11	



Answer

41a

42a

Answer

Q

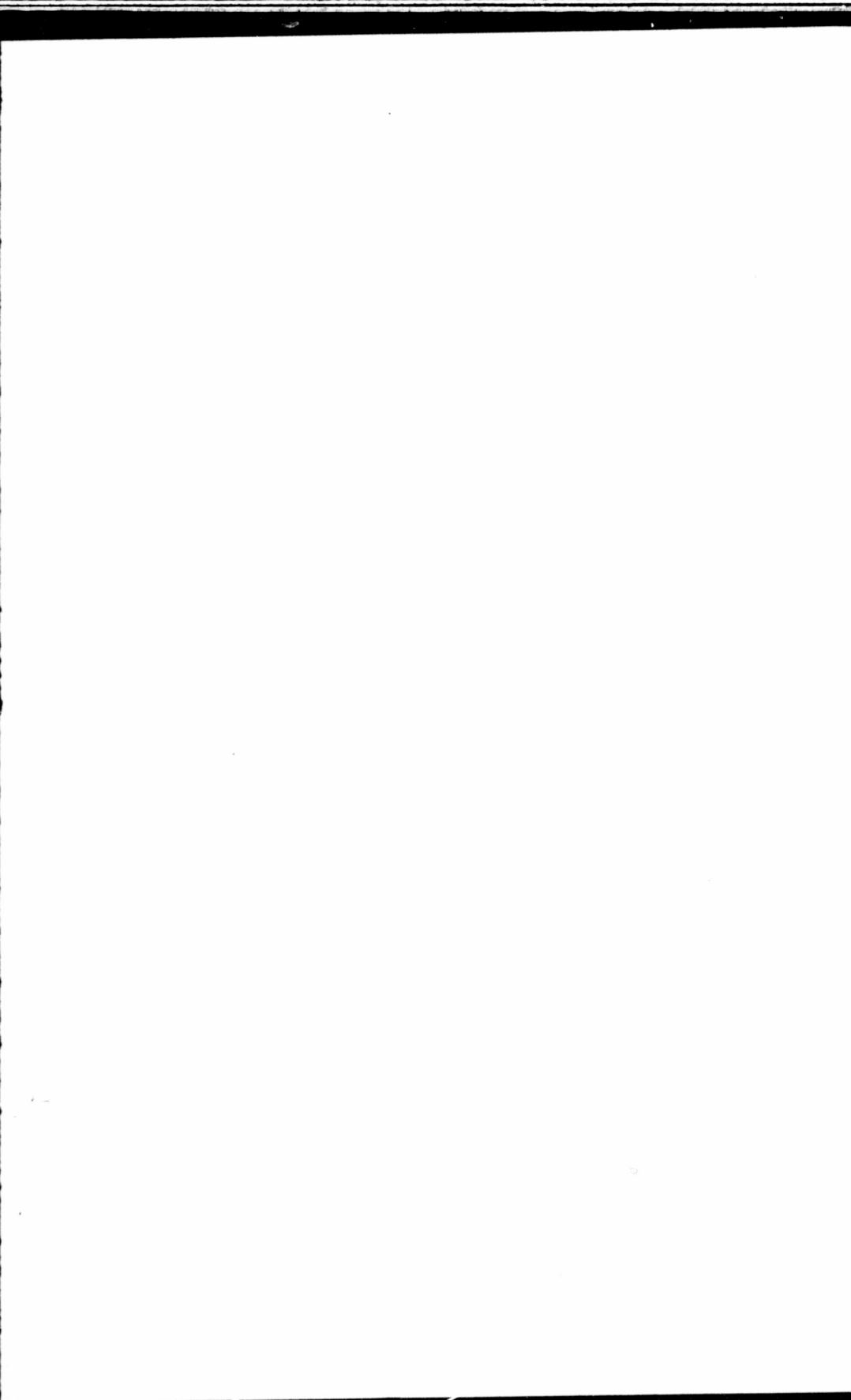
DEFENDANT'S EXHIBIT "C"
(Annexed to Foregoing Answer)



CONSUMER LABORATORY
60 Lafayette Street
New York, N. Y. 10013

PACKAGE CONTROL REPORT

NAME	A. P. TEA CO	BBW	DATE	2/21/73
ADDRESS	41-25 Greenpoint Ave	Green	LABELLED QUANTITY	5 lbs
TYPE OF BUSINESS	S/ Holt	ITEM NUMBER	7118	ERROR IN
COMMODITY	Whole Wheat Flour	1	32	ITEMS PLUS
BRAND	Woolen Special	2	34	
PACKER OR DISTRIBUTOR	GENERAL MILLS INC 1340	3	38	
LOT OR CODE	2274	Temperature	42	
NET WEIGHT	5.61	5	40	
TARE WEIGHT	1.16	6	44	
GROSS WEIGHT OF CORRECTLY FILLED CONTAINER	5.66	7	39	
EQUIPMENT USED IN CHECKING	Equal Arm Balance	8	27	
INSPECTION CERTIFICATE	B154501	9	24	
VIOLATION CERTIFICATE	9717	10	28	
RETURN DATE	MARCH 22, 1973	11	45	
NAME OF OWNER OR MANAGER (PRINT)	Pete McNamee	12	32	
RECEIPT OF REPORT	Pete McNamee	13	35	
ACKNOWLEDGE		14	36	
CALCULATIONS, REMARKS AND/OR INSTRUCTIONS:				
WT. OF STANDARD SLICR. PLATE & COMMODITY	814	15	31	
WT. OF STANDARD & SLICER PLATE		16	24	
้า		17	51	
ا		18	36	
ا		19	42	
		20		
		21		
		22		
		23		
		24		
INSPECTOR	Mayer Moran - 1/Chairman	25		



Answer

43a

DEFENDANT'S EXHIBIT "D"
(Annexed to Foregoing Answer)



NAME
ADD^E
TYPE
COMM
ERAS^E
PAGE
LET^E
NET
TIR^E
CRC^E
FIL^E
ECU^E
INS^E
VIC^E
PLI^E
HAN^E
ITV^E
REC^E
ACI^E

WT

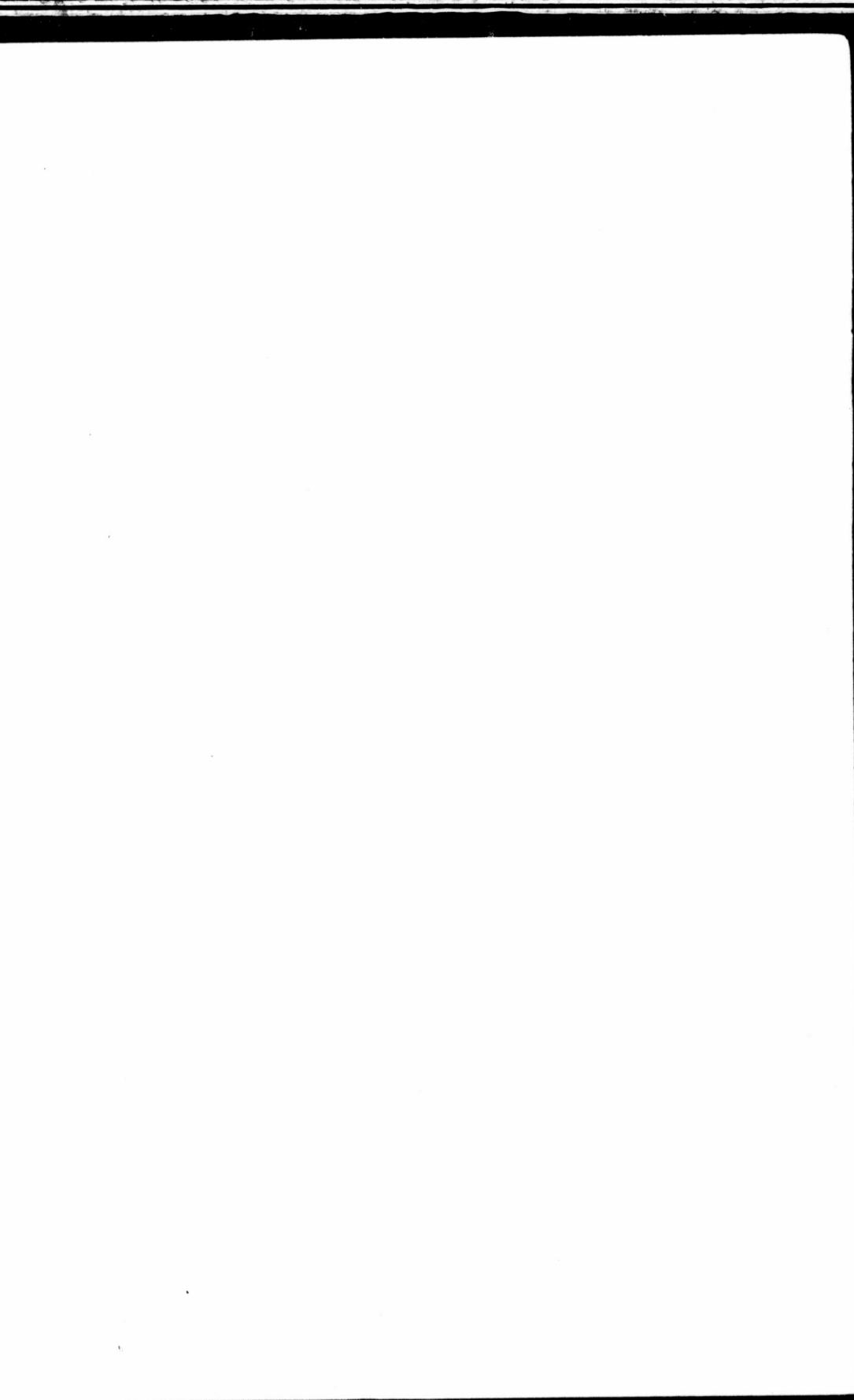
DEPARTMENT OF CONSUMER AFFAIRS
CONSUMER LAW INFORCE UNIT
80 Lafayette Street
New York, N. Y. 10013

PACKAGE CONTROL REPORT

NAME	Century Foods	BB#	43411	DATE	3/8/73
ADDRESS	167-1/4 Joyce Harvey & Pines			LABELLED QUANTITY	56
TYPE OF BUSINESS	5/100			ERROR IN	7/11/5
COMMODITY	6 lb. frozen steaks - 1/2 lb. each frozen meat			ITEM	IMOS PLUS
BRAND	Field Meats			1	(31)
PACKER OR DISTRIBUTOR	General Mill. Inc. Manufacturing Co. - 55446			2	(39)
LOT OR CODE	70322-12361			3	(26-1)
NET WEIGHT	5.6			4	5
TARE WEIGHT	13/11.3			5	(33)
GROSS WEIGHT OF CORRECTLY FILLED CONTAINER	56-13/11.3			6	(21)
EQUIPMENT USED IN CHECKING	Equal beam balance			7	11
INSPECTION CERTIFICATE	13187521			8	11
VIOLATION CERTIFICATE	9931			9	14
RETURN DATE	APRIL 5, 1973			10	30
NAME OF OWNER OR MANAGER (PRINT)	EDW BYRNE			11	12
RECEIPT OF REPORT	EDW BYRNE			12	26
ACKNOWLEDGE	EDW BYRNE			13	30
CALCULATIONS, REBATES AND/OR INSTRUCTIONS:					
WT. OF STANDARD SLKR. PLATE & COMMODITY			(636)	14	16
WT. OF STANDARD & SLICKER PLATE				15	24
Advised to remove 2 ft shot weight package full scale				16	22
INSPECTOR	Mueller + Miller			17	23
				18	26
				19	25
				20	33
				21	24
				22	23
				23	17
				24	14
				25	11

Answer

45a



46a

Answer

DEFENDANT'S EXHIBIT "E"
(Annexed to Foregoing Answer)



WARDEN'S OFFICE OF THE ATTORNEY
CONSUMER LAW DIVISION
50 Lafayette Street
New York, N. Y. 10013

PACKAGE CONTROL REPORT

NAME	Porter Price	BB#	93411	DATE	3/14/73
ADDRESS	182-04 Horace Vanderveer EX. 11365			LABELLED QUANTITY	16
TYPE OF BUSINESS	5/11145			ERROR IN	1/16
COMMODITY	ice surface flour	ITEM	ITEMS	PLUS	
BRAND	Wilkerson	1	(38)		
PACKER OR DISTRIBUTOR	The Sifters Company	2	(12)		
LOT OR CODE #	11241236	3	(40)		
NET WEIGHT	5.65	4	(34)		
TARE WEIGHT	1.16	5	(3)		
GROSS WEIGHT OF CORRECTLY FILLED CONTAINER	5.65-1.16=4.49	6	34		
EQUIPMENT USED IN CHECKING	Equal beam balance	7	(2)		
INSPECTION CERTIFICATE	6154527	8	(4)		
VIOLATION CERTIFICATE	992V	9	(4)		
RETURN DATE	APRIL 5, 1973	10	(4)		
NAME OF OWNER OR MANAGER (PRINT)	EDWARD BYRNE	11	(1)		
RECEIPT OF REPORT	EB	12	(3)		
ACKNOWLEDGE		13	(9)		
CALCULATIONS, REMARKS AND/OR INSTRUCTIONS:	(24)	14	(31)		
WT. OF STANDARD SLCR. PLATE & COMMODITY		15			
WT. OF STANDARD & SLICKER PLATE		16			
REASONS TO REMOVE 1/16 lbs weight before from sale		17			
		18			
		19			
		20			
		21			
		22			
		23			
		24			
INSPECTOR	Porter + T. Monroe	25			

Answer

17a

**Defendant's Notice of Motion for Summary Judgment
Dismissing Complaint or, in the Alternative,
for Judgment on the Pleadings
(Filed November 7, 1973)**

PLEASE TAKE NOTICE, that upon the summons and complaint, the answer, the affidavit of Henry Sumpter, Jr., sworn to on June 21, 1973, the affidavit of Donald B. Colpitts, sworn to on June 26, 1973, the affidavit of Charles E. Joyce, sworn to June 28, 1973 the affidavit of Betty Furness, sworn to November 5, 1973 and upon all the papers and proceedings heretofore had herein, the defendant will move this Court on November 15, 1973 at 4:30 P.M., or as soon thereafter as counsel can be heard, as follows:

For summary judgment pursuant to Rule 56(b) of the FRCP in defendant's or in the alternative

For judgment on the pleadings in favor of defendant, pursuant to Rule 12(c) of the FRCP and

For such other, further and different relief as to this Court may seem fit and proper.

Dated: New York, N.Y.
November 5, 1973

NORMAN REDLICH
Corporation Counsel of the City of
New York
Attorney for Defendant
Municipal Building
New York, N.Y. 10007
By: /s/ Jane Fankhanel
JANE FRANKHANEL
Assistant Corporation Counsel
Tel: 566-3039
Rm. 2711, Municipal Building

TO: WILLIAM J. CONDON
WILLIAM J. COLAVITO
420 Lexington Avenue
New York, N.Y. 10017

**affidavit of Betty Furness in Opposition to Motion
for Preliminary Injunction and in Support of
Motion for Summary Judgment
(Filed November 7, 1973)**

STATE OF NEW YORK)
ss:
COUNTY OF NEW YORK)

BETTY FURNESS, being duly sworn, deposes and says:

1. I am Commissioner of the New York City Department of Consumer Affairs and defendant in this action. I am familiar with the facts involved in this action. I have read the answer to the complaint and on the basis of the records of my Department hereby affirm the truth of the matters alleged therein, except as to those matters alleged to be true upon information and belief and as to those matters, I believe them to be true. I submit this affidavit in opposition to plaintiffs' motion for a preliminary injunction and in support of defendant's motion for summary judgment.

2. As Commissioner of the Department of Consumer Affairs, I am responsible for enforcing "all laws in relation to weights and measures." Of these laws, §833-16.0 of the Administrative Code of the City of New York, (hereinafter, §833-16.0) is critically important to the protection of New York City consumers against deception arising from the sale of shortweight commodities of every description, including foods. The deception of consumers through the sale of shortweight commodities is an old, obstinate and multifarious evil demanding vigilant and vigorous law enforcement as well as informed consumers. For the court's attention, I attach to this affidavit a copy of a brief article (Defendant's Exhibit "I") entitled "short-weighting, nothing for something," contained in the Au-

tumn, 1973 issue of "Everybody's Money," a consumer publication. The article indicates the magnitude of the problem of shortweights and states that "New York City Consumers alone are thought to lose \$17 million annually" from this evil. I do not believe this sizable figure to be an overestimation.

3. Not only flour, but most foods contain moisture and are therefore, by their very nature, subject to weight loss from evaporation. The weights and measures laws in the City and State of New York allow for variations from stated weight due to loss of moisture when caused by ordinary and customary exposure to conditions that normally occur in good distribution practice and that unavoidably result in change of weight.

4. However, not every weight loss attributable to loss of moisture is necessarily caused by ordinary and customary exposure to conditions that normally occur in good distribution practice, nor is every weight loss attributable to loss of moisture necessarily unavoidable.

5. The "true weight" language of §833-16.0, which is not defined in the ordinance, has consistently been interpreted by the Department of Consumer Affairs to mean "honest weight," i.e. to allow for "ordinary," "customary" and "unavoidable" moisture loss occurring in "good distribution practice." This interpretation is required because of the obvious hygroscopic nature of most foods and because of state law allowing for reasonable variations, as well as court interpretations of §833-16.0.

6. Since the terms "ordinary," "customary" and "unavoidable" have no objective valuation in local, state or federal law, weights and measures inspectors refer to the objective federal guidelines contained in "Handbook 67" published by the National Bureau of Standards, United

States Department of Commerce. Upon information and belief, the guidelines contained in this Handbook are used by state and local weights and measures officials in every state except California.

7. These guidelines set forth weight variations which are generally considered "reasonable" (i.e. "honest"—"ordinary," "customary" and "unavoidable"—) for prepackaged commodities, including flour. In the practical enforcement of §833-16.0, shortweights within the guidelines of Handbook 67 are not the subject of violations. Shortweights in excess of the federal guidelines of Handbook 67 are the subject of violations. This is clear from the fact that no violation was found for a package of plaintiff General Mills' flour weighing 5/16ths of an ounce under the stated five-pound weight, though its actual weight was obviously under five pounds. (See Defendant's Exhibit "2" attached hereto, and note that non-circled items are not the subject of violations.)

8. Shortweights in excess of Handbook 67's guidelines are however, not *per se* violations of §833-16.0; they are merely deemed not to be "ordinary," "customary," or "unavoidable" or to have occurred in "good distribution practice." The retailer issued a violation is not absolutely liable for the penalty merely because a commodity offered for sale by him is unreasonably shortweight under Handbook 67's guidelines. If the settlement recommended by the Department is not voluntarily paid by the alleged violator, a civil action for the collection of the penalty is commenced by the Corporation Counsel (Administrative Code, Chapter 64, §2203d-4.0). In defense to such a suit a retailer may always prove that the particular shortweight was nevertheless 'reasonable'—i.e., "ordinary," "customary" and "unavoidable" and in the course of "good distribution practice." But the practical and administra-

tive significance of the guidelines contained in Handbook 67 is that shortweights exceeding the guidelines shift the burden of proving "reasonableness" to the retailer.

9. That this is the position of the Department of Consumer Affairs as to the meaning and proper enforcement of §833-16.0 is evidenced by the facts in this case as well as by attached letter of Bernard Sack, Deputy Commissioner of Consumer Affairs, dated March 15, 1973 (Defendant's Exhibit "3"). Prior to the time this action was commenced, this letter was sent to Henry Sumpter, Jr., Vice President of plaintiff Seaboard, to Donald B. Colpitts, Technical Manager, Weights and Measures of plaintiff General Mills, and to Charles E. Joyce, Manager, Customer and Products Protection of plaintiff Pillsbury.

10. Plaintiffs have claimed that I and the inspectors of my Department have "harassed" them in our enforcement of §833-16.0. The baselessness of this claim is evidenced by the attached compilation of all flour violations issued under §833-16.0 over the past seven years, prepared by J. M. Robinson, Assistant to the Director of Field Operations of the Department of Consumer Affairs (Defendant's Exhibit "4"). This list, prepared from records in the Department, shows that during the nearly seven-year period of 1-26-67 to 10-15-73, plaintiff Pillsbury's flour was the subject of violations on sixteen occasions and plaintiff General Mills' flour (God Medal) was the subject of violations on four occasions. (The brand or brands of flour packed by plaintiff Seaboard are unknown to me.) That relatively few violations regarding flour have been issued is further evidence that the objective federal guidelines employed by the Department embody reasonable standards of variation.

11. There are no disputed issues of fact in the matter before the court. It is apparent from Departmental rec-

ords submitted with the answer to the complaint that each of the flour packages which was the subject of the complained of violations of §833-16.0 was unreasonably short-weight under the guidelines of Handbook 67. Plaintiffs do not challenge the reasonableness of these guidelines. The only disputed issues are legal—i.e. whether §833-16.0 allows for reasonable variations from stated weight, and whether it conflicts with applicable federal law. I believe that the Department's long-standing interpretation of the ordinance is correct, that it furthers the law's benificial purpose of promoting honesty in weights and measures and that there is no conflict with federal law.

WHEREFORE, it is respectfully requested that plaintiffs' motion for preliminary injunction be denied and that defendant's motion for summary judgment be granted, with costs.

/s/ Betty Furness
BETTY FURNESS

NOTARIZED

EXHIBIT "1"
(Annexed to Foregoing Affidavit)

Every time a Pennsylvania grocery clerk weighed produce, she charged her customers for more than they got: what should have been two pounds became three.

When observed by a state weights and measures inspector, the facts were clear. The woman was weighing a bit of her buxomy self along with the tomatoes.

In Colorado an inspector found numerous bags of potatoes marked to contain 100 pounds weighing about 97 pounds. While investigating he noticed an employee tossing out two or three potatoes before he sewed the sack. When the inspector asked him why he was doing this, the boy replied, "To make it easier to sew the sack."

Although probably not by design, these two employees were practicing the age-old sin of short-weighting. Their customers were being charged for food that didn't exist.

There are hundreds of ways to shortweight customers. Abuses run the gamut from gasoline pumps to taxi meters to time clocks and utility meters to boxes of napkins that contain fewer napkins than marked.

Shortweighting is so prevalent that Dr. Leland Gordon, Director of Dennison University's Weights and Measures Center, estimates consumers lose between \$6 and \$12 billion every year—a few pennies at a time. New York City consumers alone are thought to lose \$17 million annually.

Most of this cheating seems to go on in grocery stores. And says Gordon, shortweighting is especially common during inflationary periods; it's an easy way to charge a little more. (Gordon has found in his national studies that most shortweighting is the result of carelessness or ignorance, but some is deliberate.)

The largest number of violations occurs behind the meat counter.

During a 1969 survey of Tennessee, Gordon checked 118 stores; 61 percent of them were shorting packaged meats. Heavy scales, Gordon figures, were costing state consumers \$16 million a year just in meat purchases. The 1970-71 records of weights and measures inspectors in San Francisco show that 55 of 58 stores in that city repeatedly shortweighted prepackaged meat. The New York City Department of Consumer Affairs told *Everybody's Money* that it recently found 102 violations in one city butcher store. Every piece of meat was shortweighted.

For the ingenious, scale tipping offers endless opportunities. For meat alone, Gordon found 48 variations of shortweighting. The most common is weighing the package as well as the meat to get extra weight—a clever way to charge \$1.39 a pound for a Styrofoam tray.

Another shorting trick is to soak such meats as ham, poultry and oysters overnight in water. Several ounces are thus added to the weight, and you end up paying meat prices for water.

Other ways to short on meat include using inaccurate scales, setting scales fast so they read a few ounces more, having debris on scales to add extra weight, obstructing scales from the shopper's view, and weighing on the swing (before the indicator reaches zero).

Some of the same thumb-on-the-scales methods are used elsewhere in the store. As with meat, the easiest way to shortweight on vegetables and fruits is to weigh the container and charge for gross rather than net weight. Selling by the "bunch" rather than by weight or packaging by guess rather than weight are other tricks of the trade.

With factory-packed goods, slack fill is perhaps the most obvious shortweight problem. How often have you bought a box of cereal and found the top one-third empty? This may be the result of settling or of mechanical breakdown in the plant; or you may be getting less food than the weight on the box indicates.

The net weight measurement used on canned goods can be unfair too. Net weight is not a true measure of what you buy, since it includes the liquid. Drained weight is more accurate. In his 1969 survey, Gordon found that the drained weight of canned foods labeled 16 ounces ranged from 9-1/8 to 11-3/8 ounces. Although the liquid has food value, is it fair to pay food prices for it?

"Balloon bread" is another example of shorting. Some bakers make a 14-ounce loaf look like 16 ounces by baking the bread in a 16-ounce pan. The label states the weight accurately, but a lot of people don't read bread labels. Those that don't, pay for 16 ounces but get one or two ounces less.

DEPARTMENT OF CONSUMER AFFAIRS
CONSUMER LAW INFORCEMENT
60 Lafayette Street
New York, N. Y. 10013

PACKAGE CONTROL REPORT

NAME	Country Pride	BB#	93911	DATE	3/18/73
ADDRESS	187-0-4 Horse Harbor Rd., River			LABELED QUANTITY	5.6
TYPE OF BUSINESS	5.00			ERROR IN	1/14
COMMODITY	60% Farina Flour - Whole Wheat			ITEM	IMPS. PLUS
BRAND	Red Medallion			1	(3.1)
PACKER OR DISTRIBUTOR	General Mill. Inc.			2	(3.2)
LOT OR CODE #	70322-12362	Temperature		3	(3.1)
NET WEIGHT	5.00			4	
TARE WEIGHT		13/11.5		5	
GROSS WEIGHT OF CORRECTLY FILLED CONTAINER	5.6	13/11.6		6	
EQUIPMENT USED IN CHECKING	Equal Amplitude			7	
INSPECTION CERTIFICATE	B19751			8	
VIOLATION CERTIFICATE	9431			9	
RETURN DATE	4/1/73			10	
NAME OF OWNER OR MANAGER (PRINT)	E. W. BATES			11	
RECEIPT OF REPORT	RECEIVED			12	
ACKNOWLEDGE	E. W. BATES			13	
CALCULATIONS, REBATS AND/OR INSTRUCTIONS:					
WT. OF STANDARD PLATE & COMMODITY	5.141		(6.34)	14	
WT. OF STANDARD & SLICER PLATE	5.00			15	
Adjusted to prime weight shot				16	
weight package full size				17	
INSPECTOR	Country + H. M. 100			18	
				19	
				20	
				21	
				22	
				23	
				24	
				25	

Exhibit "2"

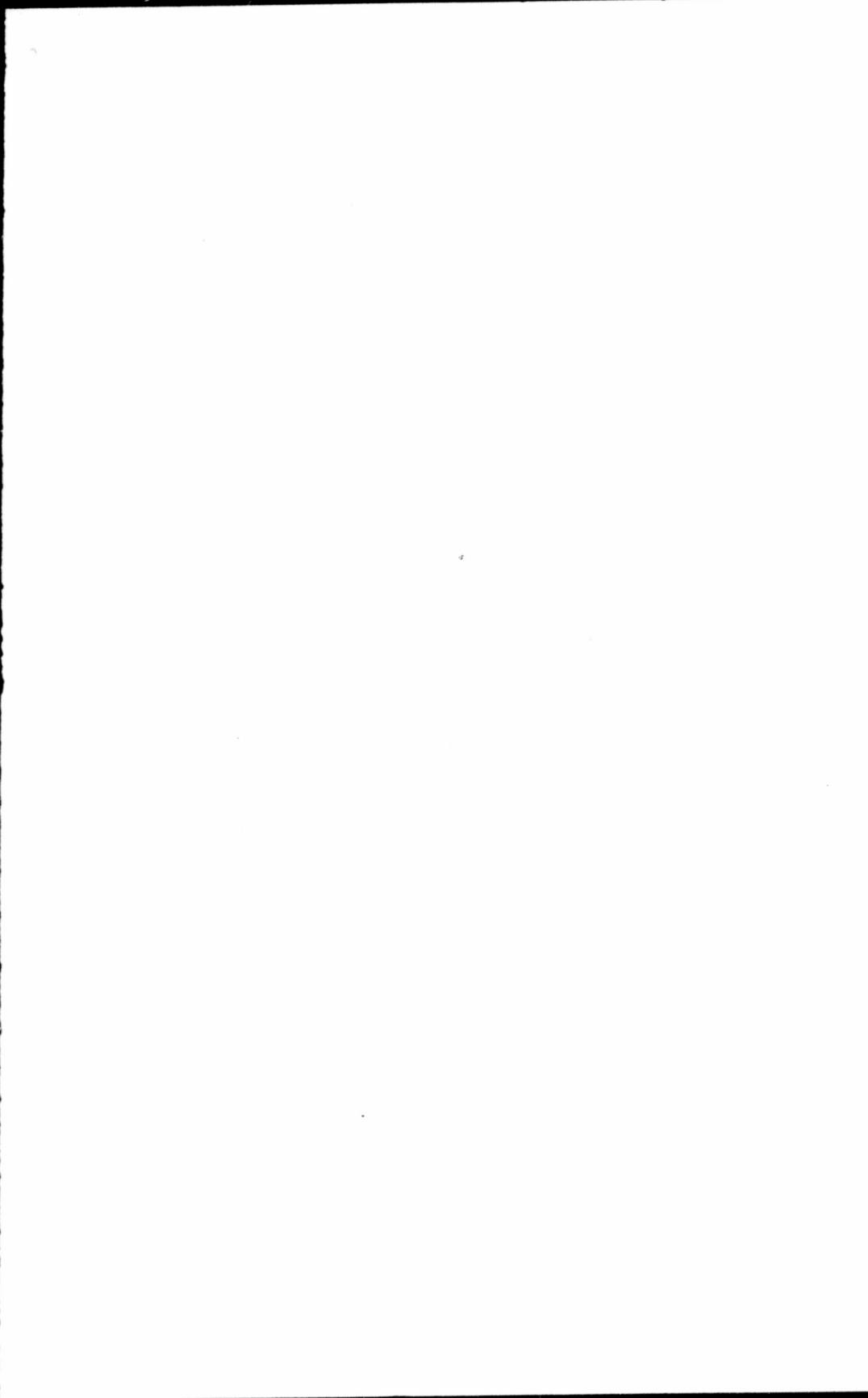


EXHIBIT "2"
(Annexed to Foregoing Affidavit)

EXHIBIT "3"
(Annexed to Foregoing Affidavit)

After reviewing the data submitted to our agency by representatives of the flour industry and manufacturers of other hygroscopic products, it is the considered opinion of the Department that hygroscopic products should be so packaged as to insure compliance with the net content requirements embodied in Handbook 67 of the National Bureau of Standards.

The Department has taken note of Section 221.8 of Title I of the Rules and Regulations of the New York State Department of Agriculture and Markets in determining its position as to variations to be allowed. The regulation does not conflict with the Administrative Code of the City of New York, Chapter 36, Title A, Section 833-16.0, which requires the sale of a commodity by true weight. The true weight is subject to the "Unreasonable Minus or Plus Errors," set forth at page 8 of Handbook 67.

Where the products are in interstate commerce, the burden of going forward with evidence and the burden of proof are upon the vendor to establish a claim that variations were caused, after the introduction into intra-state commerce, by "ordinary and customary exposure to conditions that normally occur in good distribution practice and that unavoidably result in change of weight or measure."

The mere assertion that climatic conditions and conditions of storage, handling, and display have affected net weight, without evidence that all possible affirmative action has been taken to eliminate or counteract their effects, does not warrant a determination that the issuance of a notice of violation is not justified.

In view of the above, you are advised that the civil violations resulting from the finding of short weight pack-

ages in a test of your product are deemed to have been issued properly and that all necessary steps will be taken to recover the penalties imposed.

Very truly yours,

/s/ Bernard Sack
BERNARD SACK
Deputy Commissioner

EXHIBIT "4"
(Annexed to Foregoing Affidavit)



THE CITY OF NEW YORK
Intradepartmental Memorandum

To: Jane Fankhanel, Assistant Attorney

Date: October 15, 1973

From: J. M. Robinson, Assistant to the Director of
Field Operations

Subject: FLOUR VIOLATIONS

Pursuant to your request, I have prepared a listing of the flour violations issued for the period 1967 - 1973 inclusive. Please note that the violations were issued on private label and nationally branded packages.

<u>DATE ISSUED</u>	<u>BRAND</u>	<u>VENDOR</u>	<u>ADDRESS</u>	<u>PENALTY</u>	<u>DATE PAID</u>
1/26/67	Private	1st Natl. Stores	176 Myrtle Ave.	\$25.00	2/15/67
"	"	"	79 Ave. "D"	"	"
10/30/67	"	LaPaloma Pkg. Co.	900 East 167th St.	4 @ \$25 - \$100	11/15/67
1/11/68	"	H. C. Bohack	2864 Fulton St.	1 @ \$25 - \$25	1/31/68
1/16/68	"	Finast	34-20 Junction Blvd.	1 @ \$35 - \$35	2/1/68
1/23/68		Food Fair	82-66 Broadway	\$25	2/9/68
2/9/68		"	153-55 Cross Is. Pkwy.	\$720	3/8/68
2/21/68	Private	H. C. Bohack	47-01 Broadway	61 @ \$15 - \$915	3/18/68
3/12/68	"	Finast	640 Courtland Ave.	35 @ \$5 - \$175	4/19/68
3/19/68	"	Daitch Shopwell	29-02 Union St.	15 @ \$10 - \$150	4/12/68
3/26/68	"	Hills-Korvette	3785 Nostrand Ave.	15 @ \$5 - \$75	4/22/68
5/13/68	"	H. C. Bohack	84-60 Parsons Blvd.	22 @ \$5 - \$110	6/14/68
5/23/68		Food Fair	220-16 Hillside Ave.	24 @ \$5 - \$120	6/25/68
9/10/68	Private	LaPaloma Pkg. Co.	900 East 167th St.	71 @ \$3 - \$213	10/21/68
6/9/69	"	Goya Foods Inc.	25-12th St.	32 @ \$15 - \$480	7/24/69
"	"	"	"	12 @ \$10 - \$120	"
8/3/70		"	"	12 @ \$25 - \$300	9/8/70
12/10/70		Bohack	298 West 231 St. BX	5 @ \$10 - \$50	1/20/71
12/16/70	Private	Finast	1440 Amsterdam Ave.	68 @ \$10 - \$680	2/8/71
12/21/70		A & P Tea Co.	320 East Gunhill Rd.	6 @ \$10 - \$60	1/20/71
2/10/71	Pillsbury	"	2205 Linden Blvd.	22 @ \$10 - \$220	2/8/71
					2/23/71
12/31/70	"	Daitch-Shopwell	1170 - 3rd Ave. MN	10 @ \$10 - \$100	2/25/71
1/6/71	Private	Waldbaum's	917 East 108th St. BK	5 @ \$15 - \$75	1/28/71
12/31/70		Daitch-Shopwell	2014 Cropsey Ave.	2 @ \$10 - \$20	2/27/71
1/26/71	Private	H. C. Bohack	92-10 Roosevelt Ave.	16 @ \$15 - \$240	2/17/71
1/20/71	"	Pathmark	2965 Cropsey Ave.	25 @ \$10 - \$250	3/1/71
1/28/71	"	Finast	1343 Lexington Ave.	10 @ \$10 - \$100	3/10/71
1/29/71	"	Grand Union	818 Columbus Ave.	19 @ \$10 - \$190	4/12/71
3/12/71	"	Penn Fruit	1480 Forest Ave. SI	24 @ \$10 - \$240	4/1/71
3/29/71	"	A & P	306 Church Ave.	21 @ \$10 - \$210	5/6/71
3/30/71	"	Bohack	748 - 2nd Ave., MN	13 @ \$10 - \$130	5/10/71
4/22/71	Heckers	Pioneer Mkt.	43 Columbia St.	16 @ \$10 - \$160	5/20/71

- continued -

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Exhibit "4"

FOUR VIOLATIONS (cont'd)

ge Two

DATE ISSUED	BRAND	VENDOR	ADDRESS	PENALTY	DATE PAID
4/71	Private	Royal Farms	1188 Flatbush Ave.	12 - - - - -	
27/71	"	Food Fair	656 Castle Hill Ave.	15 @ \$10 - \$150	6/28/71
3/71	"	A & P Tea Co.	5564 Broadway MN	21 @ \$10 - \$210	6/21/71
4/71	"	Royal Farms	1188 Flatbush Ave.	19 - - - - -	
6/71	"	Sloans	53 East 8th St., MN	22 @ \$10 - \$220	6/21/71
13/71	"	A & P Tea Co.	616 Melrose Ave., BX	21 @ \$10 - \$210	6/21/71
18/71	"	Pathmark	2965 Cropsey Ave.	10 @ \$15 - \$150	6/22/71
26/71	"	GrandUnion	1025 Ogden Ave., BX	13 @ \$15 - \$195	6/21/71
15/71	"	Pantry Pride	1250 Neptune Ave.	22 @ \$10 - \$220	10/20/71
29/71	"	A & P Tea Co.	1535 McDonald Ave.	9 @ \$10 - \$90	8/9/71
6/71	"	Hills	3785 Nostrand Ave.	18 @ \$10 - \$180	7/28/71
14/71	"	Grand Union	130 Bleecker St.	8 @ \$20 - \$160	8/24/71
19/71	"	Sloans	53 East 8th St., MN	7 @ \$10 - \$70	8/16/71
19/71	"	Grand Union	9319 - 5th Ave., BK	9 @ \$15 - \$135	8/24/71
28/71	"	Penn Fruit	1565 Forest Ave., SI	25 @ \$10 - \$250	9/13/71
20/71	"	A & P Tea Co.	1241 Zarega Ave.	12 @ \$15 - \$180	8/23/71
1/8/71	Pillsbury	"	459 - 3rd Ave., MN	19 @ \$10 - \$190	11/22/71
1/23/71	Private	"	85 - 4th Ave., MN	13 @ \$15 - \$195	2/2/72
2/7/71	"	Pantry Pride	156-40 Northern Blvd.	7 @ \$10 - \$70	1/24/72
2/15/71	Pillsbury	Grand Union	350 East 86th St.	11 @ \$15 - \$165	2/18/72
2/21/71	Clifton Mills	Gristede	1127 - 3rd Ave.	5 @ \$15 - \$75	2/22/72
2/7/71	Private	Pantry Pride	156-40 Northern Blvd.	7 @ \$10 - \$70	1/24/72
2/15/71	Pillsbury	Grand Union	350 East 86th St.	11 @ \$15 - \$165	2/18/72
2/21/71	Clifton Mills	Gristede	1127 - 3rd Ave.	5 @ \$15 - \$75	2/22/72
4/72	Millet	Infinity Co.	171 Duane St.	7 @ \$10 - \$70	2/29/72
15/72	Private	Daitch-Shopwell	400 West 24th St.	25 @ \$20 - \$500	2/10/72
15/72	Pillsbury	Daitch-Shopwell	400 West 24th St.	7 @ \$25 - \$175	2/10/72
15/72	Private	Daitch Shopwell	400 West 24th St.	9 @ \$15 - \$135	2/10/72
24/72	"	Penn Fruit	1565 Forest Ave. SI	25 @ \$15 - \$375	2/15/72
24/72	"	"	"	25 @ \$10 - \$250	2/15/72
31/72	"	Daitch-Shopwell	188 Ave. C., MN	20 @ \$10 - \$200	2/28/72
9/72	"	A & P	50-15 Roosevelt Ave.	17 @ \$15 - \$255	3/20/72
6/72	Pillsbury	Shop Rite	1613 East 16th St.	8 - - - - -	
15/72	Private	A & P	183 Bushwick Ave.	27 @ \$15 - \$405	4/7/72
16/72	"	Boh	2800 Atlantic Ave.	18 @ \$15 - \$270	3/20/72
2/72	"	Put	2965 Cropsey Ave.	20 @ \$20 - \$400	4/18/72
28/72	"	HO	8923 Bay Parkway	25 @ \$20 - \$500	4/7/72
28/72	"	Bohock	2851 Coney Island Ave.	22 @ \$20 - \$440	3/24/72
2/72	"	Pantry Pride	156-40 Northern Blvd.	15 @ \$10 - \$150	10/31/71
2/72	Pillsbury	"	"	12 @ \$25 - \$300	"
1/72	"	Grand St. Coop.	545 Grand St., MN	9 - - - - -	
6/72	Gold Medal	A & P	2005 - 3rd Ave., "	24 @ \$15 - \$360	4/10/72
6/72	Pillsbury	Sloans	2330 - 1st Ave., "	8 - - - - -	
13/72	Private	Sloans	1033 St. Nicholas Ave.	13 - - - - -	

4/4

- continued -

FLOUR VIOLATIONS (tinued)

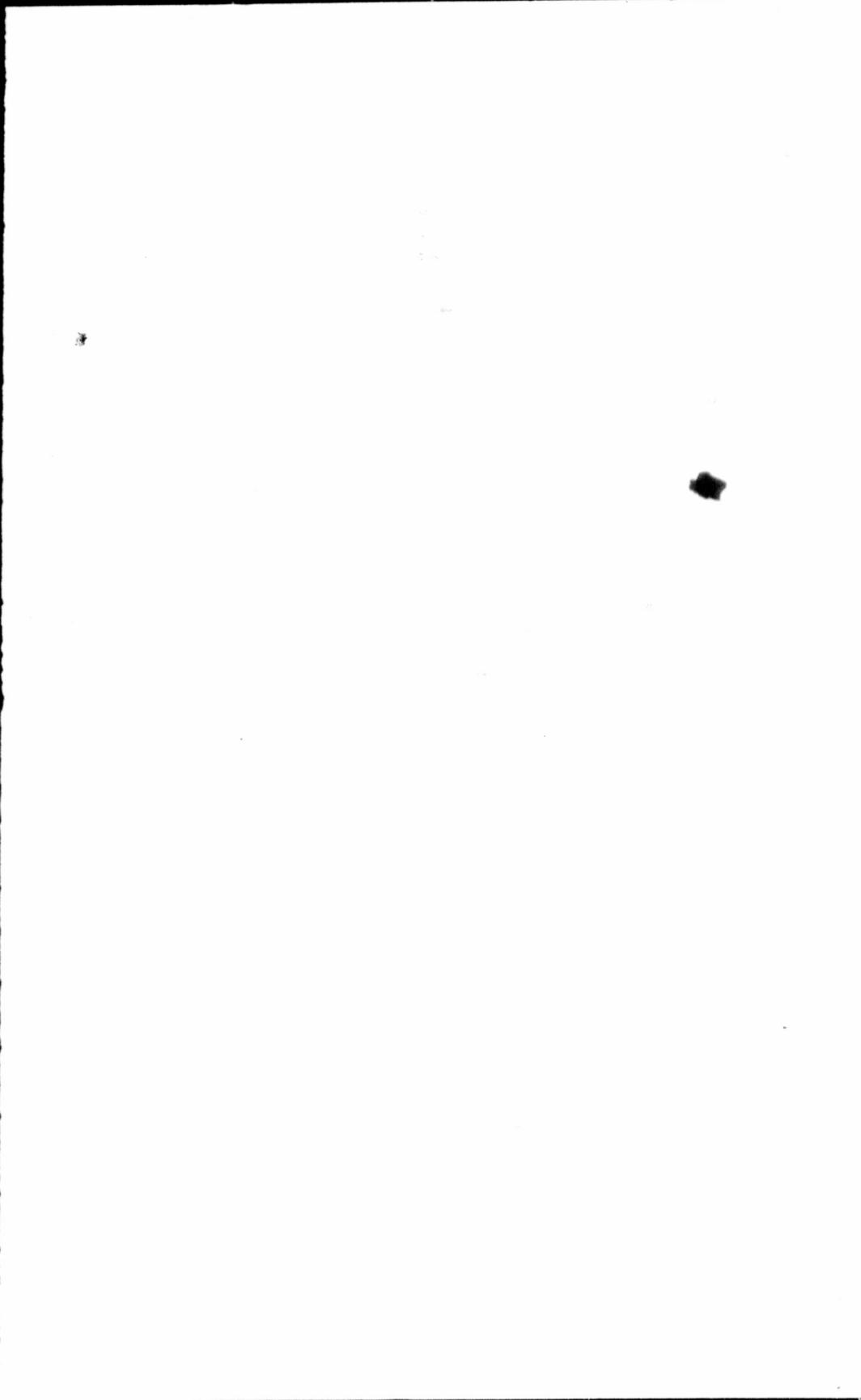
Page Three

DATE ISSUED	BRAND	VENDOR	ADDRESS	PENALTY	DATE PAID
3/27/72	Pillsbury	Dan's Supreme	2556 Boston Road	8 - - - - -	
3/22/72	Private	"	"	12 - - - - -	
4/13/72	Pillsbury	Finast	9408 - 3rd Ave., BK	8 @ \$25 - \$200	10/14/
4/13/72	"	Grand Union	9315 - 5th Ave. "	9 @ \$15 - \$135	5/26/
4/17/72	Private	Bohack	69-80 Grand Ave.	17 @ \$15 - \$255	5/18/
4/20/72	"	Grand Union	42-02 Greenpoint Ave.	10 @ \$10 - \$100	5/26/
4/28/72	"	Hills	2795 Richmond Ave. SI	3 @ \$20 - \$60	7/12/
4/28/72	"	"	"	45 @ \$15 - \$675	"
4/28/72	"	Pathmark	2875 Richmond Ave.	17 @ \$15 - \$255	6/7/72
6/21/72	"	King Kullen	3402 Steinway St.	24 - - - - -	
11/15/72	"	Penn Fruit	1565 Forest Ave. SI	16 @ \$10 - \$160	1/29/73
1/17/73	Pillsbury	Bronx Con. Coop.	50 Van Cortlandt Ave. W	21 - - - - -	
2/21/73	Gold Medal	A & P Tea Co.	41-25 Greenpoint Ave.	- - - - -	
3/8/73	Gold Medal	Pantry Pride	187-04 Horace Harding Blvd.	24 - - - - -	
3/8/73	Pillsbury	Pantry Pride	"	14 - - - - -	
5/14/73	Private	Chelsea Coop.	307 West 24th St.	14 - - - - -	
7/24/73	Pillsbury	Key Food	84-12 - 97th Ave.	14 - - - - -	
7/19/73	Private	Sloans	2833 Broadway	6 - - - - -	
7/6/73	"	"	1365 - 3rd Ave.	11 - - - - -	
"	Gold Medal	A & P	1446 - 2nd Ave., MN	15 @ \$10 - \$150	8/29/73

20
44
32
96


Jack M. Robinson
Assistant to the Director of Field Operations

JMR/mm



Affidavit of Betty Furness

61a

Reply Affidavit of Jerome J. Graham
(Filed November 12, 1973)

STATE OF NEW JERSEY:

ss:

COUNTY OF ESSEX :

JEROME J. GRAHAM, JR., of full age, being duly sworn, according to law upon his oath deposes and says:

1. I am a partner in the firm of Carpenter, Bennett & Morrissey and as such I am familiar with all of the pleadings and facts surrounding the above-referenced litigation.
2. On November 7, 1973, I received a copy of the defendant's affidavit in opposition to plaintiffs' motion for preliminary injunction.
3. Annexed to the affidavit as defendant's Exhibit 2 is a form letter dated March 15, 1973, signed by Bernard Sack, Deputy Commissioner.
4. Defendant's Exhibit 2 in the first paragraph refers to ". . . data submitted to our agency by representatives of the flour industry. . . ."
5. The data referred to was submitted to Mr. Sack in March of 1972 and consists of the complete record in the case of The Pillsbury Company and General Mills, Inc. v. Walter H. Cramer, Superintendent of the Division of Weights and Measures in the Department of Law and Public Safety in the State of New Jersey et al., Supreme Court of New Jersey, Docket No. A-122, September Term -1965.
6. Included in the record were the following documents which plaintiffs will refer to at the time of oral argument of this matter on November 15:

(a) A Study of the Net Weight Changes and Moisture Content of Wheat Flour at Various Relative Humidities by C. A. Anker and W. F. Geddes, with C. H. Bailey, Division of Agricultural Biochemistry, Minnesota Agricultural Experiment Station, University Farm, St. Paul, Minnesota, a copy of which is annexed hereto and made a part hereof as Exhibit A. (This study appears as Exhibit P1, JA327a).

(b) A chart prepared by Professor A. V. Havens, Department of Meteorology, Rutgers University, demonstrating the mean monthly relative humidity at 1:00 p.m. compared to equivalent indoor relative humidities at 70° F (data from Newark Airport 1942-1964), data which Professor Havens' testified was applicable to the entire metropolitan area, including New York City, a copy of which is annexed hereto and made a part hereof as Exhibit B.

/s/ Jerome J. Graham, Jr.
JEROME J. GRAHAM, JR.

NOTARIZED

64a

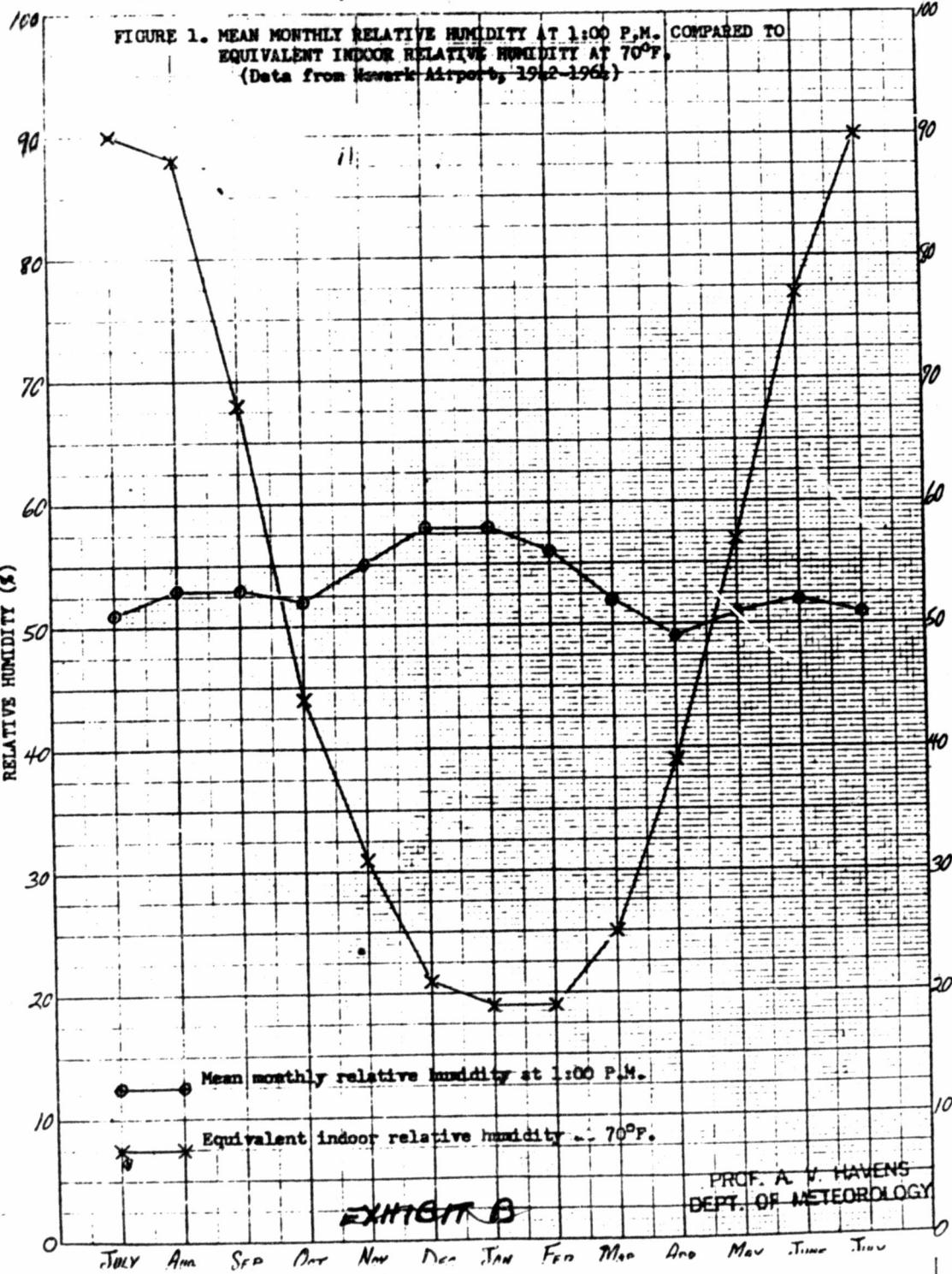
Reply Affidavit of Jerome J. Graham

EXHIBIT B
(Annexed to Foregoing Reply Affidavit)



Exhibit B

P-6 5/4/65 DA



**Defendant's Stipulation Not to Prosecute
Violations Prior to Hearing
(Filed December 7, 1973)**

IT IS HEREBY STIPULATED by counsel for the defendant herein that defendant, her agents or employees, will not prosecute any court actions, civil or criminal, to recover the penalties arising out of the alleged violations at issue pending the January 21, 1974 hearing in the District Court.

Dated: New York, N.Y.
November 30, 1973.

NORMAN REDLICH
Corporation Counsel of the City
of New York
Attorney for Defendant

By: /s/ Jane Fankhanel
JANE FANKHANEL
Assistant Corporation Counsel

Amendment to Answer
(Filed August 28, 1974)

Pursuant to the written consent of the attorney for the plaintiffs, given on November 12, 1973, defendant files herein the following amendment to her answer:

1. Page 5, paragraph 22, line 7, delete "ment" in "measurement" to read: "the true weight or measure thereof; . . .".

2. Page 5, following paragraph 22, line 7, add the following:

22-A. Pursuant to New York State Agriculture and Markets Law, Article 16, §183, the Commissioner of Consumer Affairs is the official city sealer of weights and measures in the City of New York.

22-B. In the exercise of her powers under both the Agriculture and Markets Law and the Administrative Code of the City of New York, §833-16.0, the Commissioner is bound by rules and regulations promulgated by the State Commissioner of Agriculture and Markets. Section 180 of the Agriculture and Markets Law provides that the State Commissioner:

"Shall establish, specifications, amounts of tolerance, or reasonable variations allowable for weights, measures and weighing and measuring devices, and shall make rules and regulations for the purpose of making clear and effective the provisions of this chapter relative to weights, measures and weighing and measuring devices, which rules and regulations shall have the force and effect of law, and he shall issue instructions to the county and city sealers and these shall be binding upon and govern said sealers in the discharge of their duties" (emphasis added).

22-C. The Commissioner of Agriculture and Markets has, by regulations, as required by State Law, established the variations from declared net quantity to be allowed in the enforcement of weights and measures laws, which are binding on the defendant. Title 1, Chapter V, §221.8 of the Rules and Regulations under the Agriculture and Markets Law provides:

“Variations to be allowed.

(a) Variations from declared net quantity. When caused by unavoidable deviations in weighing . . . the contents of individual packages that occur in good packaging practice . . .

(b) Variations resulting from exposure. Variations from the declared net weight or measure shall be permitted when caused by ordinary and customary exposure to conditions that normally occur in good distribution practice and that unavoidably result in change of weight or measure, but only after the commodity is introduced into intrastate commerce: provided, that the phrase ‘introduced into intrastate commerce’ as used in this subdivision shall be construed to define the time and the place at which the first sale and delivery of a package is made within the State, the delivery being either

(1) directly to the purchaser or to his agent, or

(2) to a common carrier for shipment to the purchaser . . .”

22-D. Title 1, Chapter V, §221.12 of the Rules and Regulations under the Agriculture and Market Law provides:

“Regulatory and enforcement procedure. National Bureau of Standards Handbook 67 is hereby adopted

and made a part hereof as an operational guide for the inspection and determination of the accuracy of the net content declaration of prepackaged commodities and for the determination of the reasonableness of variations, if any, from the net content declaration."

22-E. The defendant Commissioner of Consumer Affairs, in the discharge of her duties in enforcing all laws in relation to weights and measures, including §833-16.0, is bound by State Law to make allowance for reasonable variations from stated weight and to determine allowable variations according to federal standards and guidelines.

Dated: New York, N.Y.
November 14, 1973

NORMAN REDLICH
Corporation Counsel of the City
of New York
Attorney for Defendant
2711 Municipal Building
New York, New York 10007

By: /s/ Jane Fankhanel
JANE FANKHANEL
Assistant Corporation Counsel
Tel: 566-3039

**Transcript of Hearing
Dated November 15, 1973**

(2) MR. COLAVITO: Of counsel, would you please note the name of Elmer J. Bennett of Carpenter, Bennett & Morrissey.

If it please the Court, at this time I am an attorney admitted to this court, I am associated with Mr. Condon, the attorney of record for the plaintiff, and I respectfully move that Mr. Bennett be permitted under Rule 3C to argue this motion.

Mr. Bennett is admitted to the United States District Court of New Jersey, he had been admitted to the Supreme Court of the State of New Jersey.

He is a member in good standing of both Bars.

THE COURT: You want him admitted for purposes of this case?

MR. COLAVITO: For purpose of arguing this motion and whatever other appearances are required.

MISS FANCHELL: May I also ask for leave of the Court to argue the case. I am not admitted. My application is pending for admission to the federal court. Norman Redlich is, however.

THE COURT: I don't know about that, but I guess there is nothing else we can do. I wouldn't want to say that I don't think that we can proceed to have the argument on a hearing of this motion for a preliminary (3) injunction. I gather there is a motion for summary judgment, also.

MISS FANCHELL: Yes.

THE COURT: I have been on trial in another matter, an it is taking as usual much longer than anticipated, and

so the first question I want to reach here is as to whether there is any urgency at all with respect to this motion for preliminary injunction. The case has been pending I gather since—well, the complaint is stamped June 6, 1973, and the motion for a preliminary injunction was filed July 6, 1973. I think it was postponed at the request of parties from time to time, was it not?

MISS FANCHELL: That is correct.

MR. BENNETT: It was postponed, your Honor, at the request of the City's attorneys with our consent. I don't think we ever asked for a postponement. May I address the Court on this question of urgency?

THE COURT: Yes.

MR. BENNETT: As your Honor must recognize, this is in the nature of a proceeding to test the validity of certain procedures which are being followed by the Department of Consumer Affairs of the City of New York.

Long range the decision that this matter on a sound basis is more important to us than a decision this week, to be perfectly frank about it.

(4) The urgency is simply that the discriminative practices which we contend are in violation of our constitutional rights and of the federal law continue from time to time and we are to that extent through what we consider the harassment of our customers suffering some injury.

THE COURT: And what is that? What is the injury?

MR. BENNETT: The injury is to our reputation, to our relationship with our customers who are from time to time brought into court on these charges that they are offering for sale short weight packages of flour, the method of handling this is unfair and unreasonable to us in that they give the packer no warning of the fact that they are

about to make an examination, they give us no notice that they have, and most of the time we don't know about it through the retailer until the packages of flour in question have been tossed aside or broken so that we are not in a position when we do finally learn about it in many, many instances to protect our rights.

We do suffer seriously but I would like to suggest to the Court that a delay of several weeks I don't think at this point would be insufferable.

THE COURT: Then I think what we should do (5) is adjourn it because as I have indicated this trial I have is still going on, and I suspect will be going on for several days next week, and to try to take this on at this time would be impossible because I have to charge a jury next week and there are several very difficult questions which have developed during the course of that trial, so that I couldn't hear it at this point and I couldn't get a decision soon anyway.

So let me look at the calendar, Mr. Clerk.

(Pause.)

Gentlemen, I will set it down now for Monday, December 3rd, at 10:00 o'clock.

Let me ask you this: Do you plan to put on any testimony or witnesses?

MR. BENNETT: If your Honor would receive testimony at that time I think we might go to final hearing on that date.

THE COURT: It is up to you. It is your motion, your case.

MR. BENNETT: I would like to get to a final hearing on this as soon as possible.

THE COURT: You mean a trial rather than a preliminary injunction?

MR. BENNETT: Yes. This shouldn't take very (6) long. Most of the facts are indicated—most of the basic facts I think are not in dispute. There are some conclusions of fact which I have a great deal to say about, but basic facts are not very much in dispute.

THE COURT: Does the defendant agree with that?

MISS FANCHELL: I think the facts are not in dispute, your Honor, and as a consequence I think a trial would be useless.

THE COURT: Suppose you do this, then. What you could do is get together and set down those facts which you claim are not in dispute, and we can try it on a stipulation of facts.

MR. BENNETT: I would be glad to undertake to do that, your Honor.

THE COURT: I gather you have a motion for summary judgment here, and I don't think we have the statement required under Rule 9G, do we, with respect to that motion for summary judgment as to what facts are not in dispute. Do we have that?

MR. BENNETT: I haven't seen it, your Honor.

MISS FANCHELL: No. I will dispute it.

THE COURT: Perhaps we better move the date then. Suppose we move this to give you time. Do you think that is enough time for you to get the stipulation (7) together?

MR. BENNETT: I think so, your Honor.

THE COURT: All right. Get your stipulation together. Have you submitted any briefs on its merits?

MISS FANCHELL: Yes, your Honor, and at this time I would like to hand up a supplemental memorandum as well as an amendment on written consent to defendants' answer.

THE COURT: All right. Then let's leave it at December 3rd at 10:00 A.M.

MR. BENNETT: That might be a little close on an attempt to stipulate the facts. As your Honor knows I have three clients in this and two are in the mid-west and it takes a little time to clear a thing like that.

THE COURT: Suppose we move it then a little later so we have sufficient time here.

Wednesday, December 19th, at 10:00 o'clock.

MISS FANCHELL: Your Honor, I will not be in town on that date. Perhaps the 16th, would that be agreeable.

THE COURT: The only thing is—I am afraid that we may have to put this over until the 1st of the year if you can't make it then. We have a couple of trials scheduled which means I will be engaged on the 18th. I thought on the 19th I could hear it.

(8) What about the 20th, December 20th? Would you be in town that day?

MISS FANCHELL: No, your Honor, I will be gone after the 19th.

THE COURT: Until when?

MISS FANCHELL: Until the 31st.

THE COURT: Until the 1st of the year?

MISS FANCHELL: Yes.

MR. BENNETT: Your Honor, I indicated that I would have no objection to putting this over for a fairly short

period of time. I would be unhappy to see it go over for several months.

THE COURT: Well, not several months. I could probably put it down for early January. Since it is not going to be a trial, it will be primarily an argument, I would suggest you get them in brand so I can have them in mind along with your briefs.

I will set it down for Monday, January 21st, at 4:00 o'clock. I have a trial that day, but I will simply recess early and take this, but I would like you to get your stipulation in by the date I originally set, which was December 19th. The stipulation and your statement under Rule 9G, that is due Wednesday, December 19th, at 5:00 o'clock.

(9) January 21st at 4:00 p.m. we will have the argument on the case. I gather the defendant has submitted its brief on the merits?

MISS FANCHELL: Yes.

THE COURT: Have you?

MR. BENNETT: I should like some time to reply. It was just handed to me.

THE COURT: Suppose you reply by the 19th. You have also submitted your brief on the merits, to which there is a reply.

MR. BENNETT: Yes.

THE COURT: You can have until the 19th then to reply.

MR. BENNETT: Thank you, your Honor. There is one other thing. We have an understanding and a stipulation with the City that pending this application for a

restraining order, although they will continue their inspection procedures, they will not file any criminal complaint against my clients. I trust that it would be agreeable to your Honor and agreeable to the City to continue that arrangement until the trial date.

MISS FANCHELL: I must clarify that there are no criminal complaints that are issued under this ordinance. The violation is issued and the penalty (10) is sued for in a civil action.

THE COURT: Against the store owner, is that it?

MISS FANCHELL: Yes, the retailer.

THE COURT: And you are required to reimburse the store owner, is that it?

MR. BENNETT: As a practical matter we accept responsibility for our products. I don't think there is any legally binding commitment to do it but as a practical matter we are on the spot.

THE COURT: Getting back to the stipulation, are you willing to continue the stipulation that no further violations will be filed until that time?

MISS FANCHELL: We did not stipulate to stop issuing violations. We said that pending the hearing on the motion for a preliminary injunction that we wouldn't institute court actions in the state court to recover the penalties. I don't see what damage is done to the plaintiffs by going forward on these suits or penalties.

MR. BENNETT: I am merely asking we continue whatever this arrangement was. Perhaps I didn't phrase it properly because I wasn't directly involved in that arrangement. Mr. Colavito made it. Whatever it was, I would like to have it continued because we are (11) continuing this hearing.

THE COURT: Was that a formal stipulation filed here in the court?

MR. COLAVITO: I believe it was. It was signed by our office.

MISS FANCHELL: And by my office, and it was pending the hearing of—it was pending the return date of the motion.

THE COURT: I have it. It reads as follows:

"It is hereby stipulated by counsel for all parties herein that, one, the argument of the motion for a preliminary injunction previously returnable July 31st, be and the same hereby is adjourned until October 15th, at the same time and place. Two, defendant, her agents or employees, will not prosecute action civil or criminal to recover penalties arising out of the alleged violations at issue pending a hearing of this motion in the District Court."

That is what you want continued?

MR. BENNETT: That's right.

THE COURT: All right.

MISS FANCHELL: It is ordered continued then? At this stage I don't see the necessity for holding off on suing for the collection of the penalties for (12) violations already issued.

THE COURT: How is defendant hurt? As long as you filed the violation and the action is pending.

MISS FANCHELL: In essence the hearing date for the preliminary injunction would be put over then until January, and the stipulation would be continued.

THE COURT: I gather that what they have done is withdrawn their motion for preliminary injunction and

agreed to proceed to trial on a stipulation as to the facts and then the Court will issue a final injunction if they should prevail at the end or deny it based on the facts.

In other words, it is a kind of expedited trial based on a stipulation as to the facts.

MR. BENNETT: Whatever I said from the beginning here was based upon the assumption that that status quo as expressed in that stipulation would continue. If that is not to be it is a different problem.

THE COURT: It is your understanding that the defendant may continue to file violations.

MR. BENNETT: Yes, exactly as that stipulation says.

THE COURT: But they wouldn't prosecute any civil actions, any court actions, civil or criminal, (13) pending the hearing in January.

MISS FANCHELL: Could I make a conditional agreement to continue the stipulation pending consultation with the Corporation Counsel and inform both the attorneys for the plaintiffs and the Court either early this evening or tomorrow morning?

THE COURT: Early this evening?

MR. BENNETT: Your Honor, I am leaving for Florida tomorrow morning for a week, and this is just completely impractical and I suggest completely unreasonable. This is the basis on which we consented to a continuation of this application for a preliminary injunction from early in the year until now, and as I say I have no objection to having that application continued until this date in January, but I think the status quo as we agreed with the Corporation Counsel should remain.

I can see no reason for upsetting that. They shouldn't have it both ways.

THE COURT: See what the Corporation Counsel says and let us know tomorrow afternoon at 3:30 because we would like to go home tonight.

MISS FANCHELL: Yes, I dont' anticipate any change.

THE COURT: In fact, it is 5:20 now. Let us (14) know tomorrow, and then if there is still disagreement we may have to try to hear this on the 3rd as originally scheduled.

See what happens and we can take it up again tomorrow.

MR. BENNETT: Will you communicate with Mr. Colavito?

MISS FANCHELL: Yes, I will.

THE COURT: If the Corporation Counsel doesn't agree I guess we can move it up, and you will have to get to work on the stipulation faster, that's all.

(Adjourned.)

**Defendant's Statement Pursuant to Rule 9(g) of the
Rules of the Southern District of New York in
Support of Defendant's Motion for
Summary Judgment**
(Filed December 19, 1973)

In support of defendant's motion for summary judgment and pursuant to Rule 9(g) of the Rules of the United States District Court for the Southern District of New York, the following are the material facts of the instant case as to which defendant contends there is no genuine issue to be tried:

1. On January 17, 1973, weights and measures inspectors of the Department of Consumer Affairs visited the Bronx Consumers Co-op, 50 Van Cortlandt Avenue, West Bronx, New York, and weighed the net contents of 21 packages of plaintiff Pillsbury's flour, each labeled as containing five pounds net weight. When weighed by the inspectors, the net contents of all 21 packages were less than the stated five-pound weight. The shortages ranged from 7/8 of an ounce to 2-1/2 ounces. The retailer, Bronx Consumers Co-op, was issued a violation, pursuant to §833-16.0 of the Administrative Code of the City of New York, for each of the 21 packages.

2. On February 21, 1973, weights and measures inspectors of the Department of Consumer Affairs visited the Atlantic and Pacific Tea Co., 41-25 Greenspan Avenue, Queens, New York, and weighed the net contents of 19 packages of plaintiff General Mills' flour, each labeled as containing five pounds net weight. When weighed by the inspectors, the net contents of each of the 19 packages was less than the stated five-pound weight. The shortages ranged from 1 and 11/16ths (27/16ths) ounces to 2 and 13/16ths (45/16ths) ounces. The retailer, At-

lantic and Pacific Tea Co., was issued a violation, pursuant to §833-16.0 of the Administrative Code, for each of the 19 packages.

3. On March 8, 1973, weights and measures inspectors of the Department of Consumer Affairs visited the Pantry Pride, 187-04 Horace Harding Expressway, Queens, New York, and weighed the contents of 25 packages of plaintiff General Mills' flour and 14 packages of plaintiff Pillsbury's flour, each labeled as containing five pounds net weight. When weighed by the inspectors, the net contents of each of the 25 General Mills' packages was less than the stated five-pound weight. The shortages ranged from 5/16ths of an ounce, the smallest, and 11/16ths of an ounce, the next smallest, to 2 and 1/2 (40/16ths) ounces. The retailer, Pantry Pride, was issued a violation, pursuant to §833-16.0 of the Administrative Code, for the 24 packages with shortages in excess of 3/8ths of an ounce. No violation was issued for the package with the 5/16ths of an ounce shortage.

4. Of the 14 packages of Pillsbury flour, the net contents of all 14 were found to be underweight when weighed by the inspectors. The shortages ranged from 9/16ths of an ounce to 2 and 1/2 (40/16ths) ounces. The retailer, Pantry Pride, was issued a violation, pursuant to §833-16.0 of the Administrative Code, for each of the 14 packages.

5. The shortweight violations under Administrative Code §833-16.0, issued to retailers of plaintiffs' flours, are ascertained according to the standards for unreasonableness of variations from stated weight set forth in Handbook 67 (P.8) entitled "Checking Prepackaged Commodities, A Manual for Weights and Measures Officials," compiled and published by the National Bureau of Standards,

82a *Defendant's Statement in Support of
Defendant's Motion for Summary Judgment*

United States Department of Commerce. Pursuant to the standards and guidelines of Handbook 67, for a prepackaged commodity labeled as containing five pounds, a weight shortage ("minus error") in excess of 3/8ths of an ounce is considered unreasonable. Accordingly, in the case of flour packages labeled as containing five pounds net weight, the defendant and her agents and inspectors in the Department of Consumer Affairs issue §833-16.0 violations to retailers of such packages when the weight shortages ("minus errors") on individual packages exceed 3/8ths of an ounce.

6. Flour is a hygroscopic substance—its moisture content fluctuates with changes in the moisture level of the surrounding atmosphere.

7. After §833-16.0 violations are issued, settlements of the penalties are recommended by the Department of Consumer Affairs, after informal hearing with the retailer. If the recommended settlement is not voluntarily paid, the corporation counsel sues to recover the penalty provided for in the ordinance (§833-22.0). There is no liability for payment of any penalties arising from §833-16.0 violations prior to judicial review and the rendering of a judgment in favor of the City of New York.

Respectfully submitted,

NORMAN REDLICH
Corporation Counsel of the
City of New York
Municipal Building 2711
New York, N.Y. 10007

By: /s/ Jane Fankhanel
JANE FANKHANEL

**Plaintiff's Statement Pursuant to Rule 9(g) of the Local
Rules of the Southern District of New York
in Opposition to Defendant's Motion for
Summary Judgment
(Filed December 19, 1973)**

Pursuant to Rule 9(g) of the Local Rules of the United States District Court for the Southern District of New York, plaintiff states that the following are material facts as to which they contend there exists a genuine issue to be tried.

WHEAT FLOUR PROPERTIES

1. Wheat flours are foods which, by definition of the Secretary of Health, Education and Welfare, have a moisture content of "not more than 15%." (21 C.F.R. §51.1 et seq.)
2. Wheat flours like other products are hygroscopic which means that their moisture content fluctuates with changes in the moisture level and/or temperature in the surrounding atmosphere.
3. As a result of wheat flours' hygroscopic nature, a particular package of flour will vary in weight from time to time depending upon the relative humidity to which it has been exposed.
4. A package of flour will retain its original packed weight or gain weight when stored on a grocer's shelf in New York City when the relative humidity in the store is high. The same flour when stored on the same shelf will lose weight when exposed to low relative humidity.
5. A wheat kernel in its natural condition arrives at the flour mill with a moisture content of 10-14½%.

84a *Plaintiffs' Statement in Opposition to
Defendant's Motion for Summary Judgment*

6. Moisture is an essential element in the milling process. The purpose of moisture in milling is to toughen the outer bran coat of the wheat kernel (pericarp) so that the bran coat will flake rather than shatter in the course of the grinding and separating processes of the mill, thereby permitting a clean separation of pericarp from endosperm (the inner portion of the wheat kernel). Thus the moisture in properly tempered wheat is the essential catalyst which permits production of white flour with an acceptable ash specification and the efficient fractionation of the wheat kernel into a favorable distribution of the products of farina, flour, germ, shorts and bran.

7. At the end of the milling process, patent flour is produced with a moisture content which ranges from about 13 to 14%, and whole wheat flour is produced with a moisture content from about 12 to 13½%.

8. Packaging of flour by plaintiffs is totally mechanized. Weight control procedures have been established and are employed by each plaintiff to make sure that all packages of flour produced are full weight at the time they leave the mill.

9. Plaintiffs stamp a code number on each package of flour at the time it is sealed. By referring to the code number, it is possible to determine when and where that package of flour was packed, as well as other quality control information, including moisture levels at the time of packing. Such information is available to interested weights and measures inspectors upon request.

10. Although the net weight of packages of flour may fluctuate as a result of the atmospheric conditions which exist in good distribution practice up to and including the point of sale at retail, such fluctuations due to absorption or evaporation of moisture content do not vary

the quantity of dry ingredients in the package nor do they affect the flour's nutritional value or economic value.

11. Wheat flour manufactured, packaged and sold by plaintiffs, including the flour inspected by defendant and referred to in the pleadings, conforms to definitions and standards of identity set forth in 21 C.F.R. Part 15, sub-part A, promulgated by the Secretary of Health, Education and Welfare pursuant to 21 U.S.C. §§341 and 271.

12. The labeling of all wheat flour manufactured, packaged, sold and shipped by each plaintiff, including the flour inspected by defendant and referred to in the pleadings, conforms to the applicable requirements of the Food, Drug and Cosmetic Act, the Fair Packaging and Labeling Act, and the provisions of 21 C.F.R. §1.8(b)(q) and §15.1 et seq.

13. All material contained in "A Study of the Net Weight Changes and Moisture Content of Wheat Flour at Various Relative Humidities," by C. A. Anker and W. F. Geddes, with C. H. Bailey, Division of Agricultural Biochemistry, Minnesota Agriculture Experiment Station, University Farm, St. Paul, Minnesota, a copy of which is annexed to the reply affidavit of Jerome J. Graham, Jr. as Exhibit "A."

14. All of the data appearing on a chart prepared by Professor A. V. Havens, Department of Meteorology, Rutgers University, demonstrating the mean monthly relative humidity at 1:00 P.M. compared to equivalent indoor relative humidity at 70° F. (data from Newark Airport 1942 to 1964), and the fact that Professor Havens if called would testify that the data appearing on the chart is applicable to the entire metropolitan area including New York City. (A copy of the chart is annexed to the reply affidavit of Jerome J. Graham, Jr. as Exhibit "B").

ALLEGED VIOLATIONS

15. The inspectors of the Department (hereinafter at times referred to as "defendants' agents"), the administrative practices they follow, and the methods they employ in the performance of their duties are subject to the general supervision and control of defendant, The Commissioner of Consumer Affairs for the City of New York.

16. On January 17, 1973, inspectors of the Department of Consumer Affairs visited the Bronx Consumer Co-op, 50 Van Cortlandt Avenue, West Bronx, New York. At that time and place, the inspectors weighed the net contents of 21 packages of plaintiff Pillsbury bleached and unbleached flour. The stated net weight of each of said flour packages was 5 pounds. At the time of the aforesaid inspection, the net weight of all 21 packages of flour was alleged by the inspectors to be less than the stated net weight. The inspectors advised the retailer to remove the packages from sale. A copy of the package control report prepared by the inspectors setting forth findings made as a result of this inspection is annexed hereto. (A copy of said package control report is annexed to defendant's Answer as Exhibit "B", JA40a).

17. On February 21, 1973, inspectors of the Department of Consumer Affairs visited the Atlantic & Pacific Tea Company, 41-25 Greenspan Avenue, Queens, New York. At that time and place, the inspectors weighed the net contents of 19 packages of plaintiff General Mills whole wheat flour. The stated net weight of each of said flour packages was 5 pounds. At the time of the aforesaid inspection the net weight of all 19 packages of flour was alleged by the inspectors to be less than the stated net weight. The inspectors advised the retailer to remove the packages from sale. A copy of the package control re-

port prepared by the inspectors setting forth the findings made as a result of this inspection is annexed hereto. (A copy of said package control report is annexed to defendant's Answer as Exhibit "C," JA42a).

18. On March 8, 1973, inspectors of the Department of Consumer Affairs visited the Pantry Pride Supermarket, 187-04 Horace Harding Expressway, Queens, New York. At that time and place, the inspectors weighed the net contents of 14 packages of plaintiff Pillsbury's all-purpose flour and 25 packages of plaintiff General Mills bleached, unbleached and whole wheat flour. The stated net weight of each of said flour packages was 5 pounds.

19. At the time of the inspection referred to in paragraph 18, the net weight of all 14 packages of Pillsbury flour was alleged by the inspectors to be less than the stated net weight. The inspectors advised the retailer to remove the packages from sale. A copy of the package control report prepared by the inspectors setting forth findings made as a result of this inspection is annexed hereto. (A copy of said package control report is annexed to defendant's Answer as Exhibit "D-E," JA44a).

20. At the time of the inspection referred to in paragraph 18, the net weight of 24 of the 25 packages of General Mills flour was alleged by the inspectors to be less than the stated net weight. The inspectors advised the retailer to remove the packages from sale. A copy of the package control report prepared by the inspectors setting forth the findings as a result of this inspection is annexed hereto.

21. None of defendant's inspectors ascertained or attempted to ascertain the original weight of the net contents of any of the packages referred to in paragraphs 16, 17 and 18, or what might have caused variations from the

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stated net weights of the packages of flour in question or whether plaintiffs had or had not engaged in "good distribution practices."

22. Of the 24 packages of General Mills flour referred to in paragraph 20 hereof, plaintiff General Mills was able to recover 13 packages alleged to be short weight by the inspectors. These packages were submitted by General Mills to the United States Testing Company of Hoboken, New Jersey, an independent testing laboratory, for the purpose of having that laboratory determine the weight and moisture content of the flour in said packages.

23. The data resulting from United States Testing Company's analysis of the 13 packages submitted to it when compared with General Mills' records with respect to the moisture content of the 13 packages of flour when packed, demonstrates that each of the 13 flour packages had lost moisture in an amount in excess of the alleged variation in weight from that declared on the package.

24. The data set forth in the United States Testing Company, Inc. report of test, dated April 3, 1973, annexed to the Complaint as Schedule "A."

25. All data set forth in the chart prepared by D. B. Colpitts for General Mills dated April 19, 1973, annexed to the Complaint as Schedule "B."

26. As a result of the inspections referred to in paragraphs 16, 17 and 18 hereof, notices of violation were issued by defendant alleging that Section 833-16.0 of the Administrative Code of the City of New York has been violated. On April 18, 1973, a Departmental Hearing was held to consider the alleged violations. At the hearing, William J. Condon, Esq., attorney for the plaintiffs herein appeared. For each package of alleged short-weight flour

which had been offered for sale penalties were recommended by the hearing officer at the conclusion of the hearing, pursuant to Chapter 36 Title "A" §833-22.0 of the Administrative Code of the City of New York. The proposed penalties were rejected.

27. All administrative remedies with respect to the alleged violations have been exhausted.

HANDBOOK 67

28. The contents of Handbook 67 entitled "Checking Prepackaged Commodities, a Manual for Weights and Measures Officials" published by the National Bureau of Standards, U.S. Department of Commerce.

29. That Malcolm W. Jensen, when he served as Assistant Chief of the Office of Weights and Measures in the National Bureau of Standards, prepared and wrote Handbook 67.

30. That Malcolm J. Jensen, if called, would testify to the facts set forth in his Affidavit, a copy of which is annexed hereto and made a part hereof. (The Affidavit of Malcolm W. Jensen is reproduced separately at 91a).

DEFENDANT'S STATEMENT PURSUANT TO RULE 9(g)

31. Plaintiffs deny all facts set forth in paragraph 1 of defendant's 9(g) statement to the extent said facts are controverted by the facts set forth in paragraphs 16 and 21 hereof.

32. Plaintiffs deny all facts set forth in paragraph 2 of defendant's 9(g) statement to the extent said facts are controverted by the facts set forth in paragraphs 17 and 21 hereof.

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33. Plaintiffs deny all facts set forth in paragraph 3 of defendant's 9(g) statement to the extent said facts are controverted by the facts set forth in paragraphs 18, 19, 20, 21, 22, 23, 24 and 25 hereof.

34. Plaintiffs deny all facts set forth in paragraph 4 of defendant's 9(g) statement to the extent said facts are controverted by the facts set forth in paragraphs 18, 19, 20, 21, 22, 23, 24 and 25 hereof.

35. Plaintiffs deny all facts set forth in paragraph 5 inasmuch as said facts are controverted by the facts set forth in paragraphs 28, 29 and 30 hereof.

36. With respect to paragraph 6 of defendant's 9(g) statement, plaintiffs admit flour is hygroscopic but refer to paragraphs 2 and 3 hereof for an accurate definition of its hygroscopic properties and the effect of same on the net weight of a particular package of flour.

37. Plaintiffs deny all facts set forth in paragraph 7 of defendant's 9(g) statement.

WILLIAM J. CONDON
Attorneys for Plaintiffs

OF COUNSEL:

CARPENTER, BENNETT & MORRISSEY
744 Broad Street, Newark, N.J. 07102

Affidavit of Malcolm W. Jensen
(Filed December 19, 1973)

STATE OF NEW JERSEY)

ss:

COUNTY OF ESSEX)

MALCOLM W. JENSEN, being duly sworn, deposes and says:

1. At the present time I am and since April 1973 have been president of the Can Manufacturers Institute, a trade association with offices at 1625 Massachusetts Avenue, N.W., Washington, D.C. Prior to April of this year I was for many years employed by the United States Government. From July 1951 to July 1960 I was Assistant Chief of the Office of Weights and Measures, National Bureau of Standards in the United States Department of Commerce. In July 1960 I became Chief of that office and served in that capacity until April 1966, when I became Manager of Engineering Standards which included the Office of Weights and Measures. From April 1969 to December 1970 I was first, Deputy Director and later Director of the Institute of Applied Technology, National Bureau of Standards in the United States Department of Commerce, which had jurisdiction over some ten technical divisions, including the Office of Weights and Measures. From December 1970 to March 1971, I was Deputy Director of the Bureau of Domestic Commerce and from March 1971 to April 1973, when I retired from the government service, I was Director of the Bureau of Product Safety—Food and Drug Administration—in the United States Department of Health, Education and Welfare. Prior to my employment by the United States Government I was the Sealer of Weights and Measures of the City of Madison, Wisconsin, and also taught mathematics at the

University of Wisconsin. As the result of my said employment and experience I have extensive and detailed personal knowledge of the matters hereinafter stated.

2. During the period when I served as Assistant Chief of the Office of Weights and Measures in the National Bureau of Standards I prepared and wrote the Handbook entitled "CHECKING PREPACKAGED COMMODITIES, a Manual for Weights and Measures Officials," which was issued on March 20, 1959 by the National Bureau of Standards as "Handbook 67." The information and procedures set forth in the said Handbook are based upon my own extensive experience in dealing with the control of prepackaged commodities and upon information which I assembled in my capacity as Assistant Chief of the Office of Weights and Measures.

3. I have been requested by counsel for plaintiffs in this action to state the source of the table of figures which appears in Section 8.1, at page 8 of Handbook 67, under the heading, "UNREASONABLE MINUS OR PLUS ERRORS," and whether those figures have any relationship to variations, after packaging, in the weight of a hygroscopic commodity such as flour caused by changes in the relative humidity to which the package is exposed.

4. The said table of "Errors" was based solely upon information which was collected by me or under my supervision with respect to errors in the weight of packaged commodities which resulted from "deviations" at the time of packaging either because of the nature of the commodity or the limitations of the packaging machinery or of humans involved in the packaging or check-weighing operation. The said figures have nothing whatsoever to do with "variations" in the weight of hygroscopic commodities which occur, after the packing process is completed, as the result of a gain or loss of moisture caused

by changes in the relative humidity to which the commodity is exposed.

5. A thoughtful reading of the paragraph in which the table appears, together with a reading of Section 2 of Handbook 67, will clearly demonstrate the accuracy of the foregoing statement. I refer particularly to the language of the last three paragraphs at page 2 of Handbook 67 which expressly advises the inspector how to deal with problems resulting from "gain or loss of weight through the increase or decrease of moisture content beginning immediately after the packaging occurs." The following language at that point is particularly significant:

"Certain packaged products distributed through the normal packer-to-distributor-to-retailer channel are subject to gain or loss of weight through the increase or decrease of moisture content, beginning immediately after the packaging occurs.

The Model Regulation provides that 'variations from the stated weight or measure shall be permitted when caused by ordinary and customary exposure . . . to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure.' The distribution point after which such shrinkage losses are permitted is a statutory or regulatory provision that varies among the States.

It is admitted that such indefinites as 'ordinary and customary exposure' and 'good distribution practice' are difficult to set forth quantitatively; thus the experience and judgment of the inspector must be relied upon. He will learn to compare various environments and various systems of distribution and storage. As the result of his experience he will be

able to develop procedures for conducting a sound investigation that will result in the building up of a working knowledge as to what is 'customary exposure' and what may be considered to be 'good distribution practice' with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture."

6. By contrast, Step 3 under Section 8 of Handbook 67 deals with the problem of handling deviations which occur in the packing process and admonishes the weight inspector as follows:

"Consideration should be given to (1) the allowable error in the commercial device employed in the packaging process, (2) the possible error in the scale used to check the packages, (3) anticipated reasonable human errors in both operations, and (4) the susceptibility of the packaged commodity to accurate weight control at the time of packaging. The table that follows is suggested for both random and standard-pack packages that contain items of such a nature that they are susceptible of precise weight control. Standard-pack packages of such commodities as apples, potatoes, and the like cannot be controlled as precisely as can packages of commodities such as peas, corn, sugar, salt, and flour; consequently the inspector must exercise greater liberality in the determination of the reasonableness or unreasonableness of errors in packages containing large individual elements."

It is significant that the commodities referred to at that point in Handbook 67 are listed in a sequence of diminishing size, thus potatoes are smaller than apples, peas are smaller than potatoes, corn is smaller than peas, grains of sugar are smaller than kernels of corn, salt is finer than sugar, and flour is finer than salt. The point is that it is

more difficult to package precisely predetermined weights of large units of food than it is to package precise weights of smaller units of food and that the inspector should be aware of that fact when he gives consideration to "(4) the susceptibility of the package commodity to accurate weight control at the time of packaging."

7. On the basis of my personal knowledge and experience, it would be inappropriate to use the table of "Errors" which appears at page 8 of Handbook 67 as a guide to the "reasonableness" of variations in the weight of a hygroscopic commodity caused by changes in its moisture content as the result of exposure to changing relative humidity. I know, for instance, that a five-pound package of flour could lose as much as 8% of its original packaged weight when exposed to the relative humidities of less than 20% which normally and frequently occur during the winter in the northeastern part of the United States in a normally heated retail grocery store. As applied to a five-pound bag of flour, the resulting 8% loss in that situation would amount to more than six ounces; whereas the table of "Errors" in Handbook 67 would suggest that a loss greater than three-eighths of an ounce would be unreasonable.

8. I have read the "Affidavit in Opposition" filed in this cause and sworn by Miss Betty Furness on November 5, 1973 in her capacity as Commissioner of the New York City Department of Consumer Affairs. In that affidavit she states in substance that weights and measures inspectors in her department and elsewhere use the "objective federal guide lines contained in Handbook 67" to determine whether or not moisture loss in packages of hygroscopic foods is the result of "ordinary," "customary" and "unavoidable" exposure occurring in "good distribution practice." As the author of Handbook 67, I am con-

strained to say that such use of the so-called 'objective federal guide lines (meaning the table of "Errors" appearing at page 8 of Handbook 67) is a misuse of the Handbook and indicates a misunderstanding of the purpose and application of the so-called "guide lines."

/s/ Malcolm W. Jensen
MALCOLM W. JENSEN

NOTARIZED

**Transcript of Hearing
Dated January 28, 1974**

(2) THE COURT: I gather what we have on this afternoon is the plaintiffs' motion for a permanent injunction and the defendant's motion for summary judgment, is that it?

MR. BENNETT: Your Honor, as I understand it, this is our motion for an injunction pendente lite.

THE COURT: A preliminary injunction then.

MR. BENNETT: Yes, your Honor. We were unable, unfortunately, to agree with the City on a stipulation of the facts that we considered material. In accordance with your Honor's suggestion we tried, but we were unable to agree, and therefore unless the City is now willing to accept the facts as set forth in our 9(g) statement as facts, I think we cannot proceed to a final hearing.

THE COURT: Well, let's see. Is there a motion by the City for summary judgment or am I mistaken?

MR. MODRY: Yes, there is, your Honor.

MR. BENNETT: That's correct, your Honor.

THE COURT: And both parties have submitted in respect to that 9(g) statements, is that it?

MR. MODRY: Yes.

MR. BENNETT: That's correct, your Honor.

THE COURT: Well, what is your name, sir?

MR. BENNETT: My name, your Honor, is Elmer J. Bennett. I am appearing for the Newark law firm, (3) Carpenter, Bennett & Morrissey, special counsel in this matter. Counsel of record is Mr. William Colavito, who,

as you may recall, moved my special admission the last time we were before your Honor.

The gentleman on my left is my partner, Mr. Graham.

THE COURT: Now, Miss Modry, I guess you appear for the City, is that it?

MISS MODRY: Yes, with Mr. Lauer.

THE COURT: All right, then, Mr. Bennett, are you ready to proceed with the plaintiffs' motion for a preliminary injunction?

MR. BENNETT: I am, your Honor.

I would like to say as a preliminary matter, I trust that your Honor will not consider that we are prejudiced in any way in this application by reason of the fact that a considerable length of time has now passed since our application was originally noticed. There have been several adjournments. My understanding is that they were granted at the request of the City and on the basis of an understanding and stipulation that there would be no criminal prosecutions, as this matter was continued.

THE COURT: Yes, I believe I recall that.

MR. BENNETT: There is such a stipulation your (3) Honor, and there have been no criminal prosecutions initiated. There have been inspections and administrative complaints in the meantime, but no criminal prosecutions.

Now, our application, your Honor, is for injunction pendente lite to restrain the City from imposing Section 83316 of its Administrative Code on plaintiffs' flour, and from imposing on plaintiffs' flour any labeling requirement which is, as we will show, unconstitutional or in conflict with regulations which have been issued by the federal government under the Federal Food, Drug and Cosmetics

Act or under the Federal Fair Packaging and Labeling Act.

Now, in order to understand the constitutional problem and the constitutional issue which we present to your Honor, it is necessary that I spend some time in discussing the facts with respect to the nature of flour and the problems that are presented by its hygroscopic nature. These facts are all set forth either in our verified complaint or in the affidavits which we have submitted to your Honor in support of it.

In the first place, patent flour by its very nature comes out of the mills—and this is a uniform thing throughout the country—at a moisture level of somewhere between 13 and 14 percent. It is inherent in the milling process that the flour comes out this way. Whole wheat (4) flour, which has a slightly different makeup, comes out somewhere between 12 and 13½%.

Now, this is concentrated and recognized by the federal government which, in its definition of wheat flour found in 21 Code of Federal Regulations, Section 15.1, defines wheat flour as a commodity which has not more than 15 percent moisture. So this is flour so long as the moisture content is not more than 15 percent.

Now, as I have said, flour is hygroscopic, which means that by its nature it will gain and lose weight upon exposure to atmosphere at various relative humidities. The higher the relative humidity, the less it will lose, or if it is high enough, it will gain in weight. The lower the relative humidity, the more weight it will lose.

And in connection with the uniform method of packing flour in paper bags or cloth sacks, this variation in weight is unavoidable. Its extent, as I say, depends on atmospheric conditions.

There is annexed to an affidavit filed with your Honor by Mr. Graham a copy of a document entitled "A Study of the Net Weight Changes in Moisture Content of Wheat Flour at Various Relative Humidities." This study was made in 1941 by A. A. Anker, W. F. Geddes and C. H. Bailey, who are associated with the Division of Agricultural Biochemistry, (5) Minnesota Agricultural Experiment Station, University Farm, St. Paul, Minnesota.

I would invite your Honor's attention specifically and particularly, although all of the information in here, I think, is relevant to this problem, to the table entitled Table III, which appears at page, as this is printed—this is a reprint—page 136 of this reprint, which indicates the extent to which flour will gain or lose weight when stored at various relative humidities.

It indicates, for instance, that flour is stored in five-pound sacks at a relative humidity of 36 percent and at a 71 degree Fahrenheit temperature, and if it is stored at that relative humidity, that temperature, for as much as 36 days it would lose 3.37 ounces on a five-pound sack. The amount of loss varies with the period of storage. The longer the storage at certain relative humidities, the more it loses.

On the other hand, the table would indicate that the flour stored at 59 percent relative humidity would gain weight for a period of time, and then it would lose some weight.

This is the authoritative study on this subject, in this country.

THE COURT: What is the greatest variation, in (6) any event? Greatest possible variation from the stated amount?

MR. BENNETT: It depends, as I say, your Honor, on the relative humidity. We have an affidavit in here by Mr. Jensen, who is the author of this Handbook 67, which is also, I believe, attached to one of our affidavits, and which I would like to hand up to your Honor at this time, because I propose to refer to it from time to time.

This is the handbook which the City professes to follow in its administration of the ordinance, and Mr. Jensen, who authored this handbook—you will find his name on the inside page as the author—says in his affidavit that in his experience if a relative humidity gets down to 20 percent, a five-pound package of flour could lose as much as eight percent of its original package weight when exposed to relative humidities in that area. That is below the scale of the Anker-Geddes-Bailey report. They don't have laboratory data on exposure to less than 36 percent, but as I will demonstrate, relative humidities in grocery stores, in the winter, in December, January, February and March, in this area, frequently get below 30 percent and get down to 20 percent on many occasions.

So that if you ask me what the maximum possible loss is, I would say it is at least eight percent, which (7) far exceeds any loss that we are dealing with in this case.

Now, with respect to what kind of relative humidity might be expected in the New York Metropolitan area, there is annexed to Mr. Graham's affidavit a chart prepared by Professor A. V. Havens of the Department of Meteorology of Rutgers University, which demonstrates the mean monthly relative humidity at 1:00 P.M. at the Newark Airport, and Professor Havens testified, and it is so stated in the affidavit, that that was typical of the New York Metropolitan area, that at that time and at that place the relative humidity at 1:00 P.M. compared to equivalent outdoor relative humidities—well, his chart shows how an

outdoor relative humidity which actually existed at Newark Airport at that period would translate into indoor relative humidities in the winter at a temperature of 70 degrees Fahrenheit.

I think it might be helpful if your Honor has a copy for her, because what it shows is that from the basis of Professor Haven's findings over a period from 1942 to 1962, the outdoor relative humidity at Newark Airport was above 50 percent, and that the outdoor relative humidity in the winter months went up to almost 60 percent, but when that same air is brought inside and exposed with the same moisture content, there is no variation in the moisture content (8) involved, because humidity is relative; it is the relationship between the humidity, the moisture content and the air temperature. When that same air is brought inside, in the winter time, and heated to 70 degrees, the relative humidity drops well below 30 percent, in November, December, January, February, March and part of April, and indeed during part of December, all of January, some of February it drops below 20 percent.

Now, as I have indicated to your Honor, the table in the Anker-Geddes-Bailey report shows that if a five-pound sack of flour is exposed to a relative humidity of as much as 36 percent for 35 days, it would lose 3.37 ounces. No, it would lose 3.37 percent, which translated into ounces means that it would lose 2.9 ounces at that relatively high relative humidity.

Now, the greater shortage in any of the package is involved in the complaints which are referred to, that is, the short weight complaints which are referred to in our complaint, is much less than this 2.9 percent which, according to this scientific data, would occur during these winter months.

And, as a matter of fact, these violations, these alleged violations, all occur during the winter.

If your Honor will look at the dates, they are (9) alleged to have occurred in January, February and early March. And also if your Honor will look at the table of violations which is annexed to—

THE COURT: And what do they claim is the variation from the amount stated, the actual amount?

MR. BENNETT: If your Honor will bear with me for a moment, they say that the actual shortage or variation ranged with respect to 21 packages which were inspected on January 17, '73, that they ranged from 7/8 of an ounce to 2½ ounces.

They say with respect to the 19 packages which were inspected on February 21, 1973, that the variation ranged from 1-1/16 ounces to 2-13/16 ounces and with respect to the batch inspected on March 8th, they say that the variation ranged from 5/16 of an ounce, 11/16 of an ounce to 2-1/2 ounces.

THE COURT: That more or less corresponds with the data that you referred to at the beginning, the first group.

MR. BENNETT: That shows a much greater loss could have been anticipated on the basis of the data that we have put in the record, and the loss which the inspector actually found.

Now, there is another way to approach this (10) question of whether this loss actually occurs as the result of a short weight packing by the packer or whether it was the natural and unavoidable consequence of normal distribution processes.

There is a method of determining, your Honor, exactly what the weight of these packages was originally at the

time they were packed. This method is actually used in New Jersey, and I might say that since this method has been adopted in New Jersey, there have been very few if any findings of short weight flour in New Jersey.

The method is simply to ascertain the dry weight of the flour. The moisture is completely evaporated. As I say, it is known that the original moisture content and the exact moisture content can be ascertained from records which the companies will frequently make available.

It is possible to find out what the dry weight is now, to reconstitute it by calculation and find out what the weight was when it was originally packed.

Now, we actually did this, your Honor, with respect to some of these packages. We weren't able to get hold of all of these packages because we don't always know about these inspections and orders to put the flour off shelf until long after they happen, and the retail merchants aren't particularly concerned with our problem. But we were (11) able to get hold of some of the packages that were involved in these complaints. We submitted them to the United States Testing Laboratory in Hoboken, who conducted this dry weight test, and the result of this, which is shown in Schedule B annexed to our complaint, and it is verified, the result of this test was that every package which is now alleged by the City of New York to have been short weight, originally exceeded the stated five-pound weight by substantial margins.

If your Honor will look at the table, I don't think it is necessary at the moment, but it will bear out what I say. Those packages originally exceeded the stated net weight by margins ranging from 4/16 of an ounce to 2-1/16 of an ounce.

Now, this brings me to Handbook 67 on which the City relies for its determination of what is a reasonable or unreasonable shortage and presumably for its procedures.

Now, in this Handbook 67, which was prepared by Mr. Jensen for the National Bureau of Standards, there appears a table at page 8 which is entitled Unreasonable Minus or Plus Errors.

In other words, if this means what the City says, then any minus error in excess of what they say is unreasonable or any plus error is unreasonable.

(12) Now, this table shows that with respect to a four to seven pound package, $3/8$ of an ounce would be unreasonably short. It doesn't say that it is a package of flour or a package of something else. It is just a package.

According to this, $3/8$ of an ounce would be unreasonably short and $3/4$ of an ounce would be unreasonably overpacked.

As I pointed out, this dry test actually shows that our clients overpacked almost all of these packages in excess of the overpack tolerance permitted by Handbook 67.

THE COURT: Well, let's see. Do you dispute the City's claim that these packages were under the weight stated on the package?

MR. BENNETT: At the time they were weighed by the City, they weighed what the City says they weighed.

THE COURT: That is, less than the stated amount by a few ounces, is that it?

MR. BENNETT: That's right, and less than this $3/8$ of an ounce—more than this $3/8$ of an ounce in some cases, at the time they were weighed.

What I am saying, your Honor—

THE COURT: And you claim that that results from the moisture loss, is that it?

MR. BENNETT: That is exactly what we say, your (13) Honor. The facts of life with respect to flour are that it would vary, the moisture loss, which is affected by relative humidity, it will vary down and it will vary up, and there is nothing that the millers can do to control it once it gets beyond the millers' possession, and it is subjected to normal handling. There is no evidence here that these packages were handled abnormally in any way. They were kept on a grocer's shelf as flour always is.

THE COURT: Well, why isn't this whole problem resolved by your client simply understating by a few ounces?

MR. BENNETT: Because we are not permitted to do that, our Honor, by federal law. We would be in violation of the federal law, and, of course, we would be in violation of the New York law, too, which quite—

THE COURT: You said a couple of ounces perhaps, that the package might be a couple of ounces less than the stated amount due to the loss of moisture, is that right?

MR. BENNETT: That's right.

THE COURT: And that this occurs with a product known as flour, is that right?

MR. BENNETT: That's correct, your Honor.

THE COURT: And that is known in the industry, is that right?

MR. BENNETT: That's correct your Honor.

(14) THE COURT: And you say for you to understate the weight, to take account of that—

MR. BENNETT: I am not sure I understand your Honor. We can't underestimate it. We can't say five pounds—

THE COURT: Let's say the package weighs, as you say, five pounds three ounces, because I thought you said you had more in each one of these packages from the beginning; is that right?

MR. BENNETT: When they were packed they were all overpacked. According to this finding of the U.S. Testing Laboratory they were all overpacked. But we are not allowed by federal law or, indeed, by New York City or New York State law to say five pounds when packed. We have to say five pounds. That is required by the federal law.

THE COURT: What I am getting at is why, if you say the package contains five pounds in the package, and you packed it at five pounds five ounces, does that violate some law?

MR. BENNETT: Yes, it does.

THE COURT: What law does it violate?

MR. BENNETT: It violates the federal law which does not permit overpacking.

THE COURT: Well, will you read to me what law it violates, because then, as you indicate, that would take (15) care of the moisture problem, and the moisture affects the weight, and five ounces are lost to the moisture, then you have got five pounds as stated on the package.

Now, I want to know what law that violates.

MR. BENNETT: It violates the regulations under the federal law, your Honor, which require—

THE COURT: Read it.

MR. BENNETT: Which requires that the package when shipped shall state the net weight, not more. It would violate—

THE COURT: Not more, yes. I am talking about less, stating less than the net weight. The net weight would be five pounds five ounces, but the package would state five pounds. In other words, you have understated the actual weight.

MR. BENNETT: We have to the extent that it is overpacked, and overpacking is not permitted beyond a reasonable amount, and no miller can tell when he packs this flour where it is going to be, how long it will be outside, how long it would be in a warehouse, how long it will be inside.

THE COURT: I am just simply saying, why can't you take into account this loss of moisture which you claim is the reason for the City's finding your packages slightly short? Unless I misunderstand this case. Maybe I don't (16) understand it. But I thought that is what you were saying. The City found that your weights were short by an ounce or two.

MR. BENNETT: That's right.

THE COURT: You claim that that resulted from moisture loss, is that right?

MR. BENNETT: That's right, your Honor.

THE COURT: So why can't you take account of that moisture loss and overpack the package by an ounce or two or three ounces, and then understate the actual weight by two or three ounces?

MR. BENNETT: For two reasons, your Honor. In the first place, the flour packer and miller cannot tell when he packs the flour how much is going to be lost because

he doesn't know whether it will be kept in a warehouse at outside temperatures or whether it will be kept on—

THE COURT: Well, you said they can tell the maximum possible loss under the worst possible conditions. Didn't we just go through that?

MR. BENNETT: I said it might be eight ounces, according to Mr. Jensen's affidavit, and the other reason is that if they would overpack eight ounces, they would be overpacking 99 and 98 percent of the time; the customer would be getting more than the stated net weight, and you (17) couldn't—the manufacturer just can't tell when he packs what the loss is going to be. He does overpack something, and I think the best answer is that the federal law and regulation contemplate all this and do not require him to do it. The federal law says that it is properly packed and labeled—I think the best—

THE COURT: Oh, yes, you were starting to show me how that would violate the federal law. We haven't seen it yet.

MR. BENNETT: Well, I can call your Honor's attention to the language of the federal law. The federal Food, Drug & Cosmetics Act prohibits the introduction of misbranded food in interstate commerce.

Now, if it had five pounds eight ounces in the package and it said five pounds, it would be misbranded, and there are—

THE COURT: And it is done for the purpose of taking advantage of a loss which you say will inevitably occur because of moisture. Do you think that would be held to be a misbranding of the package?

MR. BENNETT: I think it would be. The loss doesn't inevitably occur, your Honor. It occurs in some circum-

stances. It occurs when the flour is kept on a shelf in a heated store in the winter time. In the summer time (18) it could gain weight.

Actually, I suppose you could break the bags, if it is overpacked. There are problems with the packing machinery as to how much—

THE COURT: You mean you couldn't leave space on the top in the event of expansion from overweight resulting again from the moisture factor?

MR. BENNETT: This is not in the record, your Honor, but there are, I assure you, problems with overpacking, practical problems.

What we do have in the record here are the legal problems which arise in connection with overpacking. The federal law says that there shall be an accurate statement of the quantity of the contents in terms of weight, measure or numerical count, and that under this provision requiring an accurate statement, reasonable variations shall be permitted.

That is the Federal Food, Drug & Cosmetic Act.

THE COURT: Do they define a reasonable variation?

MR. BENNETT: Yes, they do.

THE COURT: In the regulations? What is that?

MR. BENNETT: Yes, they do. Here is the regulation under the Fair Packaging & Labeling Act, which is the federal law:

(19) "The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or unavoidable deviations in good manufacturing

practice will be recognized. Variations from stated quantity of content shall not be unreasonably large."

Now, that can mean unreasonably large understated or unreasonably large overstated.

This is not a novel problem, your Honor. It was dealt with many years ago in a case that has since been considered a leading case in this area, in Texas, over against the State of Texas, where bags of flour were found at the time of inspection to be under the stated net weight, and the Texas court held that a prosecution and a fine on that basis was a violation of the constitutional rights of the flour packer and vendor on the ground that this cannot be controlled, that there was no evidence that they were not full weight when packed, and that therefore to prosecute a person as a result of an unavoidable loss of weight during the distribution process was a violation of the due process clause of the United States Constitution.

THE COURT: Why can't you state on the package that information for the benefit of the consumer, that as a (20) result of moisture factors this package may weigh slightly less or slightly more than the stated weight.

MR. BENNETT: The flour millers would be delighted to do that, your Honor, but the federal law and regulation and federal authorities will not permit them to do it. They just absolutely will not permit them to do it.

The whole problem would be solved if they could put on the label, "net weight when packed, five pounds." No problem whatsoever. But this is not permitted. It would be a violation of the federal laws and the regulations.

THE COURT: I see. And you say it would be a violation of the federal law to underestimate the actual weight by a few ounces?

MR. BENNETT: It would be a violation to understate it by a sufficient amount to assure that these packages would not be understated net weight when inspected in this area in the winter months, because in order to do that, the overpack would have to be so large as to exceed what the federal government will permit.

THE COURT: Eight ounces, is that it?

MR. BENNETT: That is the testimony of Mr. Jensen in his affidavit, that the loss in this area at a 20 percent relative humidity would amount to as much as eight ounces on a five-pound bag.

(21) I think, your Honor, I misspoke myself. I think it is eight percent, which, of course, is quite a bit more since there are 90 ounces in a bag.

Let me make sure of that.

Yes, eight percent is what he said.

THE COURT: But you say you haven't found that to be the case, is that it?

MR. BENNETT: It has not been found to be the case in any of the complaints that are referred to in this proceeding. The maximum loss referred to in any complaint in this proceeding, as I recall it, is about, oh, 2-1/2 ounces and eight percent of the 90 ounces, which is a five-pound bag, would be 7.8 ounces, and the greatest loss that is involved in this proceeding is something like 2-1/2 ounces, and, as I said, when reconstituted by the laboratory, it was found that every one of them was overpacked at the time they were shipped by the miller—by the mill.

Now, your Honor suggests that they ought to overpack them some more so this wouldn't happen. Well, if they knew in advance exactly what kind of relative humidity and for how long these packages would be exposed to it,

whether they are going to be in a warehouse in New York or a heated grocery store in New York, it might be possible to come somewhere within the range, but nobody knows, and it (22) certainly would not be reasonable to require these millers to overpack every five-pound package regardless of where it is being shipped or how it is going to be handled by a sufficient amount that it would never be less than the stated net weight. It just would not be reasonable.

Now, I have some other authorities dealing with this, your Honor. There is a case in the Supreme Court of the State of New Jersey entitled State against Hotel Bar, which involved this problem. In New Jersey the authorities were enforcing a section of the statute which did not provide for any variation whatsoever, would not permit any variation in the weight of hygroscopic commodities. There was another section which did authorize variations to be established under regulations to be prescribed.

The court said that they couldn't enforce short weight claims against merchants in New Jersey and packers in New Jersey unless and until they had set up a reasonable regulation which would recognize the inherent quality of flour to lose weight when subjected to low relative humidities.

The State then adopted a regulation which is called Regulation 50, and which came before the New Jersey courts again, several years later, in a case entitled State against Waldman, which is reported in 61 N.J. Superior, (23) beginning at page 403.

THE COURT: Have you cited all these in your brief?

MR. BENIETT: Yes, your Honor, I have. And the court there was dealing with Regulation 50, which did say that variations from stated net weight should be permitted when they are the result of exposure to normal dis-

tribution and handling processes, but it went on to say, provided the average weight of any lot or shipment shall not fall below the stated net weight.

In response to that question, the New Jersey court in the Wildman case said that that was an invalid, unconstitutional provision because obviously if a shipment is all on the shelf at the same time and goes through the same shipping process, they are all going to lose or gain weight together, so that if you say that the average can't be below it, you are completely unreasonable, and that is a denial of due process.

Now, Section 83316 of the New York City ordinances, under which we are charged here—I think it is important for your Honor to remember that we are not charged with a violation of any New York State law nor any New York State regulation; we are charged with a violation of the City Ordinance, and the City Ordinance makes no provision (24) whatsoever for any variation in the weight of a hygroscopic commodity. All it says is, it shall be unlawful to sell or offer for sale any commodity or article of merchandise at or for a greater weight or measure than the true weight or measure thereof—period. It is just flat.

THE COURT: Well, do you think that in enacting that, the New York City Council wasn't aware of this moisture problem you are talking about? Is that it?

MR. BENNETT: It would appear so, your Honor, because I would think that if they were, they would have done what the federal government did and what New York State, in fact, has done, provide—New York State has a statute which authorizes variations and authorizes the promulgation of regulations which recognize variations, and pursuant to that, New York State has promulgated regulations, and this is Section 221.8 of the Weights & Measures Manual.

THE COURT: What variations does it allow for?

MR. BENNETT: In the case of variations resulting from exposure—and it is important to bear in mind the distinction between variations which occur as the result of a packing process. This is the inability of machines to be exactly right. This will go up and down from package to package slightly. In that case, the average should not be below the stated net weight because if the machine is set (25) properly it will turn out an average weight that is proper, but with respect to variations resulting from exposure, the New York State regulation says, variations from the declared weight or measure shall be permitted when caused by ordinary and customary exposure to conditions that normally occur in good distribution practice and that unavoidably result in change of weight or measure.

Now, that actually tracks the federal regulation which is exactly the same, so that the federal authorities, New York State authorities have recognized this problem and have dealt with it in the legislation.

The City of New York has not, and we are charged with violations of the New York City ordinance.

Now, the Commissioner says that notwithstanding the language of the ordinance, that our administrative practice gives recognition to the hygroscopic nature of flour, and she says that she does this by following this Handbook 67 issues by the National Bureau of Standards and, in fact, as the Jensen affidavit clearly shows, the City of New York misunderstands and misapplies this Handbook 67. It was never intended to mean what they say it means.

What they say it means is that if a package, in this case flour, and it could be anything, is more than 3/8 of an ounce short on a five-pound package, then it is (26) sus-

pect, and they start the process of a criminal violation proceeding. That isn't what this table means at all. This table clearly recognizes the distinction which I pointed out to your Honor between variations in the packing process and variations which result from ordinary and customary exposure.

The part of this handbook which deals with variations resulting from customary and ordinary exposure is set forth at the beginning, under the heading General Considerations, at page 2, and if your Honor will bear with me, I think it is of great importance that I read this so that your Honor can fully understand this distinction.

And what it says is, certain packaged products distributed through the normal packer to distribution to dealer channel are subject to gain or loss of weight through the increase or decrease in moisture content beginning immediately after the packaging occurs. The model regulation provides that "variations from the stated weight or measure shall be permitted when caused by ordinary and customary exposure to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure."

The distribution point after which such shrinkage losses are permitted is a statutory or regulatory provision that varies among the states. It is admitted that such (27) indefiniteness as ordinary and customary exposure and good distribution practice are difficult to set forth quantitatively. Thus the experience and judgment of the inspector must be relied upon. He will learn to compare various environments and various systems of distribution and storage. As the result of his experience he will be able to develop procedures for conducting a sound investigation that will result in the building up of a working knowledge as to what is "customary exposure" and what

may be considered to be "good distribution practice" with respect to the packages of an individual commodity that may gain or lose weight through gain or loss of moisture.

Now, that deals with that aspect of the problem.

This material which the City cites as establishing a standard deals only with the other aspect of the problem, the deviations in weighing and packaging, and this begins at page 7 of this handbook, where it is said:

"Consideration should be given to (1) the allowable error in the commercial device employed in the packaging process.

(2) The possible error in the scale used to check the packages.

(3) Anticipated reasonable human errors in both operations.

(28) And (4) the susceptibility of the packaged commodity to accurate weight control at the time of packaging.

The table that follows is suggested for both random and standard pack packages that contain items of such a nature that they are susceptible of precise weight control.

Standard pack packages of such commodities as apples, potatoes and the like, cannot be controlled as precisely as can packages of commodities such as peas, corn, sugar, salt and flour.

Consequently, the inspector must exercise greater liberality in the determination of the reasonableness or unreasonableness of errors in packages containing large individual elements."

I call your Honor's attention to the progression here. We start off with apples, potatoes and the like. They are big things.

We come down to corn, sugar, salt and flour, going from larger ones to smaller ones.

What this says is that in the packing process you can more accurately control the weight as it comes out of the packing line with respect to items which are large, and that is all that is meant by this table.

(29) If your Honor would refer to Mr. Jensen's affidavit, he says so quite expressly. I will just read the last paragraph. I commend it all to your Honor, but I don't want to entrench upon too much of your Honor's time. I know it is late in the day.

"I have read the affidavit in opposition filed in this cause and sworn by Miss Betty Furness on November 5, 1973 in her capacity as Commissioner of the New York City Department of Consumer Affairs. In that affidavit she states, in substance, that weights and measures inspectors in her department and elsewhere use the 'objective federal guidelines contained in Handbook 67' to determine whether or not moisture loss in packages of hygroscopic foods is the result of 'ordinary, customary and unavoidable exposure occurring in good distribution practice.' As the author of Handbook 67 I am constrained to say that such use of the so-called objective federal guidelines (meaning the table of errors) appearing at page 8 of Handbook 67 is a misuse of the handbook and indicates a misunderstanding of the purpose and application of the so-called guidelines."

THE COURT: All right, I will hear from the City in reply to your motion.

MR. BENNETT: Well, may I point out how this is in conflict with federal law, your Honor, or does your Honor (30) want to rely on my brief?

THE COURT: If you will be brief on it.

MR. BENNETT: I think I can.

Now, the result of all this is that New York City has a procrustean labelling requirement that on its face permits no variations which is in direct conflict with the federal law and regulation, which does permit variations. As a matter of fact, the federal regulation says that no state regulation shall be permitted which requires a different marking or labelling from that required by the federal law.

THE COURT: Which is less stringent, is that it?

MR. BENNETT: Less stringent—

THE COURT: And New York law is not less stringent, is it?

MR. BENNETT: It requires a different label.

We are in complete conformity with the federal law when we put the flour in these packages and the stamp on them, five pounds net weight. We are in complete conformity with federal law at that time and I don't think anybody disputes that.

Now, when it comes into the store and has been sitting there, through December, January and February, and it is because of loss of moisture it is several ounces under, (31) New York City would require us, if we had to have the true weight on the label, to put a different label on. We would have to say, "Net weight four pounds 8-1/2 ounces."

This is a different labelling, and that label is in conflict with the federal label which we lawfully put on that package when we shipped it in interstate commerce.

Another aspect of this is that New York City's labelling requirement discriminates against interstate commerce because the flour loses weight at certain times of the year, as time elapses, after the packing and if we are going to ship flour here from Montana—in fact, some of the flour involved in these complaints was shipped from Montana—it loses weight on the way. If the flour is packed, say, in Buffalo, where there are substantial mills, it isn't nearly as long on the way, and actually it could be shipped all the way from Montana to Jersey City in complete compliance with federal law, lawfully in interstate commerce, and then as soon as you ship it across the river, it is banned by the State of New York.

So I say that this law as administered by the State of New York is an illegal burden and interference on interstate commerce, and it discriminates against interstate commerce, and prohibits clients from selling in New York City flour which they have shipped perfectly legally into (32) the State and City of New York for sale.

This is also a denial of due process. It stops them from conducting legitimate business in the City of New York.

We have no remedy. These proceedings are brought against our customers and retailers, but we are responsible for them. We have to bear the brunt of these and if your Honor will read our second brief here in opposition to the motion for summary judgment, you will see that we have cited several cases where a person who is not a party to the proceeding was held nevertheless to have a good standing to bring an action for an injunction.

The Bantam Books case is one of them. These are United States Supreme Court cases, where a publisher was held to have standing to bring an action to enjoin an interference with the sale of his books by retailers, and we think our case is very much like that.

So what we are asking this Court to do is for its assistance in enjoining what we say is an illegal administrative practice and an illegal administration of the law which on its face violates our constitutional rights.

If I may, I will refer to the authorities in our briefs.

THE COURT: All right. I will hear from the City.

(33) MS. MODRY: First of all, not every weight loss attributable to moisture in the air, attributable to loss of moisture, is necessarily caused by ordinary and customary exposure. It is conditions that normally occur in distribution practice. There may very well be traditions existing in the retail store which the manufacturer has no control over whatsoever and which may very well cause a weight loss. It may be stored, for example, behind the shelf for a very long period of time, in a very hot place. This would very well cause a moisture loss. However, the state law requires—adopts the standards of Handbook 67 which is an official government publication by the National Bureau of Standards, and it sets forth guidelines to guide local inspectors in determining what is and what is not a reasonable variation from the stated weight.

We maintain that despite Mr. Jensen's affidavit to the contrary,—and Mr. Jensen is at the present time representing the industry and not the consumer—that he handbook speaks for itself, and not only specifically refers to flour, but in the preface on page 8, before the table, it says, "It will be noted that the suggested plus allowances are twice the suggested minus allowances at each labelled quantity. This is an acknowledgement that packers must be allowed to overfill such packages as are susceptible of (34) moisture loss."

This is part of the table. So the table contemplates its use with packages that may lose weight because of low humidity in the air.

I would also point to the humidity table submitted by the plaintiffs, which shows a very high humidity in the summer months, when it would be reasonably expected that the package would take on weight rather than lose weight, and actually 30 percent of the violations that have occurred over a period of six years did occur in the summer months, when there shouldn't really have been any violations, according to plaintiff's theory.

I should also point out that both the federal law and the state law and the local law are directed to benefit the consumer and to benefit the consumer very directly so that the consumer knows that she is not buying short weight, and I don't think the City or the State will charge any violations for an excess of weight, nor do I think the federal law will, since it is designed to protect the consumer.

Now, the state law specifically adopts Handbook 67 as a guideline in determining which food or which agricultural products are short weight.

Under state law the Local Commissioner or sealers of weight are bound to follow the state law so the New York (35) City Commissioner has no choice when she enforces the true weight language, but to adopt the reasonable variations set forth in Handbook 67, or she would be in violation of state law.

THE COURT: Where was that reference to the fact that moisture variations—

MS. MODRY: Page 8, your Honor, right before the table, it says, in parentheses, "It will be noted that the suggested"—

THE COURT: Plus allowances, yes.

MS. MODRY: And then, "this is an acknowledgement."

THE COURT: All right.

MS. MODRY: In any event, ours is not a rigid ordinance. It is not an ordinance that says that everyone is automatically in violation whose package is in excess or is short weighted by more than 3/8 of an ounce.

We say that this is a reasonable allowance. This is what our inspectors are going to enforce. But if you can come forward, when we issue a violation, and say that in a particular case you have engaged in good distribution practices, your retailer has done all he could to preserve the weight of the package, that there won't be a violation. It is merely that the burden is shifted to the retailer and not to the manufacturer, incidentally, to show (36) that in those few cases when violations are issued—and there have been, I must point out, over a period of 1967 to 1973, using the guidelines in Handbook 67, there have been only 16 violations in six years against the General Mills flour, four violations against General Mills flour and I believe 16 against Pillsbury flour. We don't know enough about the third plaintiff to say what the violations have been. But this accounts for most of the violations; we say this accounts for most of the violations, and it may be that they are short weighting it to begin with. It may be that the package is loose and that flour gets out, and there may be a loss of weight due to that, or there may be a loss of weight because of the storage conditions in the retailer over which, of course, the manufacturer would have no control.

In that respect I am not sure that the manufacturer has standing, because he has no control over what happens in the retail store.

I should also point out that the federal statute does not permit all weight loss due to moisture to be necessarily a reasonable variation. It prohibits unreasonable

variations without the finding of them any more specifically.

So that all variations, in something like hygroscopic (37) flour, or flour are not necessarily in conformity with federal law.

I should also point out that I think all food or most foods do have some moisture content and will add or decrease the weight depending on the moisture in the air, and it is a question of either putting such a burden on the local inspectors to find out facts that aren't within their province or allowing us to enforce the law based on reasonable guidelines, reasonable, objective guidelines set forth in a federal official publication, and still letting the defendant come forward and saying that in this particular case we did all we could and it was beyond our control.

That is what our law purports to do. There are not criminal violations—

THE COURT: Do you suggest that they could take care of the moisture loss which they claim is responsible for the short weight here simply by understating the true weight by a few ounces?

MS. MODRY: I don't think there is any doubt about it, your Honor.

THE COURT: And that would not in any event violate the New York ordinance?

MS. MODRY: No, your Honor.

THE COURT: As you say, it seems unlikely that (38) it would be held to violate the federal or state law, is that it?

MS. MODRY: That is correct.

THE COURT: All right. Is there anything else?

MR. BENNETT: May I be heard just a moment or two in response to this?

THE COURT: Yes.

MR. BENNETT: I believe I heard Ms. Modry say that Mr. Jensen is now employed by the industry. If she meant by that the flour industry, we should correct it. He is a representative of an industrial association, but it has absolutely nothing to do with the flour industry.

I would like to correct that misapprehension if there was one.

Now, it has been said that the provision in this table of unreasonable minus or plus errors is to permit sufficient overpacking so that this problem won't occur, and the permissible overpack of the five-pound bag is 3/4 of an ounce.

If your Honor will look at the table, Schedule B, which is annexed to our complaint, showing the result of reconstituting these very packages which brought us here, you will find that the overpack actually runs from a minimum of one ounce, which exceeds the 3/4 of an ounce, up to as (39) much as 2-1/16 of an ounce, so the overpack was in excess of what, according to the City, is a permissible overpack which I think indicates the magnitude of our problem.

THE COURT: The City says it is a permissible overpack? Where is that?

MR. BENNETT: The City relies on this table which appears in Handbook 67 at page 8 and which says that an overpack may be permitted in the case of a four to seven-pound package in the amount of 3/4 of an ounce. That seems to be the maximum overpack that according to their construction of this handbook would be permit-

ted. Actually we have overpacked every one of these packages in excess of that amount.

THE COURT: And you say you have overpacked all of your packages in excess of an ounce?

MR. BENNETT: The minimum overpack shown in this schedule of reconstituted weight, the minimum overpack is one ounce. This is Schedule B annexed to our complaint.

THE COURT: And who did that reconstitution?

MR. BENNETT: The reconstitution was done by the United States Testing Laboratory at Hoboken by determining the dry weight of these very packages of flour and then—U.S. Testing Laboratory didn't do it; our client did it—by calculating what the package must have weighed originally, (40) knowing that the package originally was at least 13 percent moisture.

You just calculate it back. This is the method that has been used in New Jersey with great success from the point of view of the industry for a number of years. It hasn't been successful from the point of view of finding violations because it demonstrates that the violations don't exist and that is what happened here.

Every one of these packages that are set forth in this schedule are overpacked in excess of what the City now says would constitute a maximum overpack.

THE COURT: Well, let me see if I understand this. You have a schedule where each of these packages claimed by the City to be underweight were tested or reconstituted, is that it?

MR. BENNETT: That's correct.

THE COURT: And it was found as to those packages each one was originally overpacked by—

MR. BENNETT: Not less than one ounce.

THE COURT: Not less than one ounce.

MR. BENNETT: Running up to as much as 2-1/16 ounces.

THE COURT: Yet the City found that they were underpacked to the extent of up to 2.8, was it?

(41) MR. BENNETT: Well, I don't know about these specific packages because, as I said, we couldn't get hold of all the packages that were ordered off sale—

THE COURT: What do they claim?

MR. BENNETT: The alleged underweight runs around 2-1/2 ounces maximum. I think the greatest underweight that they claim is 2-1/2 ounces.

THE COURT: And you say that results from loss of moisture, is that it?

MR. BENNETT: That's right, your Honor, because when you determine their original weight by this dry weight process, we find that they were all overpacked when they were shipped.

THE COURT: And you say that to put in an additional two ounces then, two and a half ounces, would somehow violate some law, is that it?

MR. BENNETT: No, we did put in 2-1/2 ounces. I say there is a limit on the amount you can put in. We did put in that, but if we had put in enough so that there could never be—

THE COURT: You say it was overpacked by two ounces?

MR. BENNETT: Yes.

THE COURT: If you put in another additional two (42) ounces, you say that that would violate some law and you can't do it?

MR. BENNETT: There is a limit. Yes. Theoretically it would. The federal law says that the package when shipped in interstate commerce shall state the net weight of the contents of the package.

THE COURT: And it is your suggestion that if you overpacked it by two ounces to take care of the moisture loss you are subject to being in violation of that federal law and may be prosecuted, is that your suggestion?

MR. BENNETT: I say we did overpack most of these packages by—

THE COURT: No, I am asking you if you added another two ounces to take care of the loss which the City has found, you would be subject to prosecution, you think, in violation of the federal or state laws?

MR. BENNETT: Theoretically, your Honor, I recognize the practicality of the situation. I also pointed out—

THE COURT: Well, it would just seem to me to be an outrage, to say the least, that somebody is going to be prosecuted for attempting to remedy a condition which everybody recognizes exist. You can be prosecuted for in good faith taking action to remedy this situation?

(43) MR. BENNETT: They did that, your Honor.

THE COURT: Where?

MR. BENNETT: They are being prosecuted right now because they did that and they are being prosecuted—

THE COURT: Where?

MR. BENNETT: They overpacked every one of these packages.

THE COURT: Where are they being prosecuted?

MR. BENNETT: They are being prosecuted right here in the City of New York and that is what our complaint is all about.

Now, what your Honor is suggesting is they should have overpacked some more.

THE COURT: That's right, by two ounces.

MR. BENNETT: How much? Because no one knows what atmospheric conditions it will be exposed to, and if one packer may overpack two or four ounces, ultimately the consumer is going to pay for it. You don't get something for nothing. There is no free lunch, your Honor, and the consumer is going to pay for it if this happens, and this is in violation of the theory of the federal regulations which is that you—

THE COURT: I gather the City is suggesting the consumer is paying for the short weight now, is that it? (44) And they would like that corrected?

MR. BENNETT: The consumer is paying for a loss of water, your Honor, and the consumer always finds water in the tap and reconstitutes this flour when he uses it. There is no real loss. The reality of it is that the consumer is entitled to a certain weight of dry flour. The water goes up and down, and water is free. There is no fraud on the consumer here, so long as this flour is fully packed when shipped in interstate commerce. If it goes up and down because water comes in and water goes out, it doesn't hurt the consumer. The consumer always puts water in the flour when it uses it for cooking purposes, and the water costs nothing.

THE COURT: All right. I will reserve decision on both motions.

MR. BENNETT: May I make just one more point, your Honor? That is on the burden of proof. The City has said there is no problem because if we charge them with a violation all they have to do is show that it was properly handled and distributed and so forth.

The burden of proof is not on the packer. The burden of proof is on the prosecutor, and I refer your Honor again to *State against Waldman*, where the New Jersey court said, "First assuming the validity of Regulation 50, upon (45) whom does the burden of proving the reasonableness of the variation fall?"

The judge said, compare *State against Rabatten*, citing a New Jersey case, with *U.S. against Kraft Phoenix Cheese Corporation*, 18 Fed. Supp. 60, where the court held that under the Federal Food and Drug Act, the government had to show that the deficiency exceeded the permissible variation.

This is no big burden. They do it in New Jersey all the time, your Honor. It is no big burden, and it is the only realistic way to handle this problem.

THE COURT: I don't know that I understand that, but anyway, I will reserve decision.

MR. BENNETT: Thank you, your Honor, for your patience in hearing me out.

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**Opinion Dated February 22, 1974, Denying
Plaintiff's Motion for a Preliminary
Injunction and Granting Defendant's
Summary Judgment Motion in Part
(Filed February 25, 1974)**

OPINION

Plaintiffs, who are manufacturers and packagers of wheat flour, bring this action for a declaratory judgment. Jurisdiction is based on 28 U.S.C. §§1331(a), 1332(a), 1337.

They have moved for a preliminary injunction against the Commissioner of Consumer Affairs, City of New York, to restrain the enforcement of Section 833-16.0 of the Administrative Code of the City of New York against their flour products on the ground that the ordinance is preempted by the federal Fair Packaging and Labeling Act, 15 U.S.C. §§1451, et seq., and the Food, Drug, and Cosmetic Act, 21 U.S.C. §§301 et seq., violates Due Process, and imposes a burden on interstate commerce. The Commissioner of Consumer Affairs in turn moves for summary judgment.

Oral argument was heard on both motions on January 28, 1974. The court denies plaintiffs' motion for a preliminary injunction and grants defendant's motion for summary judgment in part.

Inspectors of the Department of Consumer Affairs have visited several retailers and have issued violations for packages the contents of which weighed less than the five pounds marked on the packages.

The parties agree that flour is a hygroscopic substance, that is, its moisture content fluctuates with changes in the moisture level of the surrounding atmosphere.

The federal Fair Packaging and Labeling Act prohibits the distribution in interstate commerce of packaged consumer commodities unless in conformity with regulations enacted pursuant to section 1455 and unless "[t]he net quantity of contents (in terms of weight, measure, or numerical count) shall be separately and accurately stated in a uniform location upon the principal display panel of that label . . .". 15 U.S.C. §1453(a).

The federal regulations provide that

"[t]he declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large." 15 C.F.R. §1.8b(q).

The federal Food, Drug and Cosmetic Act similarly prohibits the introduction or delivery for introduction into interstate commerce of any food that is misbranded. 21 U.S.C. §331(a). The Act further provides that food packages are misbranded unless they contain an accurate statement of the quantity of the contents, provided that ". . . reasonable variations shall be permitted . . ." by regulation. 21 U.S.C. §343(e).

Finally, Section 833-16.0 of the Administrative Code of the City of New York provides in pertinent part:

"It shall be unlawful to sell or offer for sale any commodity or article of merchandise, at or for a greater weight or measure than the true weight or measure thereof . . ."

Plaintiffs claim that the ordinance does not permit reasonable weight variations resulting from loss of moisture.

Defendant, on the other hand, argues that, like the applicable federal statutes, the ordinance does allow for reasonable variations.

The court agrees with defendant's interpretation of the ordinance. See *Emerald Packing Corp. v. Hygrade Food Products*, 200 N.Y.S. 2d 534, 23 Misc. 2d 915 (App. Div. 1st Dept. 1960).

Defendant further argues that the Department treats variations from a table of "unreasonable minus or plus errors," contained in a handbook prepared by the U.S. Department of Commerce, National Bureau of Standards. (Handbook 67, National Bureau of Standards, Exhibit A, attached to Answer), as *prima facie* violations. The manual was intended for use by state and local weights and measures officials and describes "a method for controlling various types of prepackaged commodities." (Handbook 67, p. 1.)

According to defendant, once a *prima facie* violation of §833-16.0 is found, the burden is placed on the retailer to show that the shortweight errors were unavoidable and caused by ordinary and customary exposure to conditions that normally occur in good distribution practice.

Standing

Plaintiffs have standing to bring this action even though the violations complained of have been issued against retailers who are not before the court.

In order to have standing, a party must allege ". . . that the challenged action has caused him injury in fact, economic or otherwise." Moreover, it must appear that the interest sought to be protected by the plaintiff is arguably within the zone of interests regulated by statute or the Constitution. *Data Processing Service v. Camp*, 397 U.S. 150 (1970).

Plaintiffs in this action have alleged that defendant's actions have damaged their reputations among retailers and the general public. (Complaint, §29.) Moreover, it is arguable that plaintiffs are within the zone of interests regulated by the Constitution and federal statute.

Summary Judgment

There does not seem to be any dispute that defendant's inspectors issue violations only when the flour packages' weight shortages are more than 3/8ths of an ounce, the amount of error said to be unreasonable in Handbook 67, pp. 7-8. (Defendant's Statement Pursuant to Rule 9(g), §5.)¹

Therefore, the court will assume that defendant's inspectors make some allowance for variations in net weight.

The court will now consider each of plaintiffs constitutional and statutory claims.

1. Commerce Clause

The court holds that the commerce clause does not forbid state and local regulation of weights and measures of packages which have been transported in interstate commerce for the reasons stated in Judge Friendly's opinion in *Swift & Company v. Wickham*, 230 F. Supp. 398, 402-03 (S.D.N.Y. 1964) (three-judge court), aff'd 334 F. 2d 241 (2d Cir. 1966), cert. denied, 385 U.S. 1036 (1967). The framers of the Constitution did not intend to preclude state or municipal regulations of weights and measures,

1. Plaintiffs deny paragraph 5 of Defendant's Rule 9(g) statement to the extent it is inconsistent with paragraphs 28, 29 and 30 of their Rule 9(g) statement. Plaintiffs' Statement Pursuant to Rule 9(g), §35. In paragraphs 28-30, and the affidavit referred to therein, however, plaintiffs merely allege that defendant has misinterpreted Handbook 67 and should not have used the table of "errors," which appears at p. 8, as a guide to the reasonableness of weight variations resulting from changes in moisture content.

"one of the oldest exercises of governmental regulatory power." *Id.* at 402.

However, it may that the city ordinance, as enforced by defendant, unduly burdens interstate commerce and is, therefore, unconstitutional. See *Florida Avocado Growers v. Paul*, 373 U.S. 132, 152-156 (1963).

Plaintiffs will, therefore, be permitted, on the trial of the permanent injunction, to prove that the city ordinance is unnecessarily burdensome. In this connection, they would have to prove first that the ordinance, as it is enforced, imposes standards substantially more stringent than those of the applicable federal laws. Furthermore, plaintiffs would have to prove that the municipal requirements exceed the limits necessary to vindicate legitimate local interests, unreasonably favor local producers, or constitute an illegitimate attempt to control the conduct of packagers beyond the borders of New York. See *Florida Avocado Growers*, *supra*, at 154.

2. Due Process

There is no merit to plaintiffs' claim that defendant, by failing to allow for reasonable variations from the stated net weight of the packages, has violated their right to due process guaranteed by the Fourteenth Amendment.

"... [R]egulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

Defendant, charged by N.Y. Agriculture and Markets Law, §183, and Administrative Code of the City of New

York, §833-21.0, with the responsibility of determining whether violations should be issued pursuant to applicable municipal ordinances and state statutes prohibiting unreasonable weight variations, could have reasonably concluded that, ordinarily, weight variations greater than those indicated on p. 8 of Handbook 67 were unjustified. Neither procedural nor substantive due process requires absolute certainty to support the issuance of a violation.

3. Applicable Federal Statutes

Finally, the court holds that the municipal ordinance is not preempted by either the federal Fair Packaging and Labeling Act or the Food, Drug and Cosmetic Act.

"[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Avocado Growers, supra*, at 142.

Compliance with both federal and local regulations is not a physical impossibility and, therefore, the nature of the regulated subject matter does not require a conclusion that the federal regulations preempt the local ordinance.

There would seem to be an irreconcilable conflict only if the local ordinance required plaintiffs to do something which the federal statutes and regulations prohibited.

This would be the case if, in order to comply with the local ordinance, plaintiffs were required to over-fill their packages in order to compensate for inevitable moisture losses, in amounts that would place them in violation of the federal statutes and regulations.

However, as plaintiffs have argued, federal law permits reasonable variations from stated weights. Plaintiffs have

not offered any support for their argument that overfills sufficient to avoid liability under the New York ordinance would be deemed unreasonable under the federal statutes and regulations.

Finally, Congress has not manifested an intention to preempt all ordinances relating to labeling or packages which have been in interstate commerce.

The Supreme Court has already held that the Food and Drug Act is not preemptive of state regulation. *Corn Products Ref. Co. v. Eddy*, 249 U.S. 427 (1919).

The Fair Packaging and Labeling Act provides: "It is hereby declared that it is the express intent of Congress to supersede any and all laws of the States or political subdivisions thereof insofar as they now or hereafter provide for the labeling of the net quantity of contents of the package of any consumer commodity covered by this chapter which are less stringent than or require information different from the requirements of section 1453 of this title or regulations promulgated pursuant thereto." 15 U.S.C. §1461.

The Conference report, in its explanation of this provision, quoted from the House of Representatives report as follows: state laws or regulations with respect to the labeling of net quantity of packages which impose ". . . inconsistent or less stringent requirements . . ." would be preempted. U.S. Code Congressional and Administrative News, 1966, p. 4094.

It, therefore, appears that Congress intended to preempt only those state laws or regulations which were less stringent or incompatible with the new federal statute. Since plaintiffs argue that the city ordinance is more stringent than the federal law and since the court has concluded that the two laws are not incompatible,² the municipal ordinance is not preempted.

2. See pp. 9-10, *supra* [JA136a].

The court accordingly grants defendant's motion for summary judgment in part. The trial of the permanent injunction will be limited to the issue of whether the municipal ordinance unduly burdens interstate commerce.

Preliminary Injunction

The two-fold requirement for a preliminary injunction is a demonstration of probability of success on the merits and a showing that irreparable harm will result if such relief is denied, *Gulf & Western Industries, Inc. v. The Great Atlantic & Pacific Tea Company, Inc.*, 476 F.2d 687 (2d Cir. 1973), or that serious questions are raised and the balance of hardships tips sharply in plaintiffs' favor. *Charlie's Girls, Inc. v. Revlon, Inc.*, — F. 2d —, Docket No. 73-2002 (2d Cir., decided Aug. 30, 1973).

In view of this court's disposition of defendant's summary judgment motion, plaintiffs will prevail on the merits only if they can prove that Section 833-16.0 of the Administrative Code of the City of New York unduly burdens interstate commerce. Plaintiffs have not made any showing that they will be able to meet that burden. Nor do the equities tip decidedly in plaintiffs' favor.

The motion for a preliminary injunction is accordingly denied.

Dated: New York, New York
February 22, 1974

CONSTANCE BAKER MOTLEY
U.S.D.J.

**Order Denying Plaintiffs' Motion for Preliminary
Injunction and Granting Defendant's Motion
for Summary Judgment in Part**
(Filed March 8, 1974)

In accordance with this court's opinion, dated February 22, 1974, plaintiffs' motion for a preliminary injunction is denied and defendant's motion for summary judgment is granted in part.

The trial of plaintiffs' motion for a permanent injunction will be held on April 29, 1974 at 10:30 P.M. in Room 2703 of the Courthouse and will be limited to the issue of whether Section 833-16.0 of the Administrative Code of the City of New York, as applied to plaintiffs, unnecessarily burdens interstate commerce.

Dated: New York, New York
March 5, 1974

SO ORDERED:

/s/ Constance Baker Motley
CONSTANCE BAKER MOTLEY
U.S.D.J.

Plaintiff's Request for Admissions
(Filed March 28, 1974)

TO: **ADRIAN P. BURKE, ESQ.**
Corporation Counsel, City of New York
Municipal Building
New York, New York 10007

Plaintiffs, General Mills, Inc., The Pillsbury Company, and Seaboard Allied Milling Corporation, request defendant, Betty Furness, Commissioner, Department of Consumer Affairs, and her successor Eleanor Guggenheimer, within 30 days after service of this request to make the following admissions for the purpose of this action only:

1. That each of the following statements is true:

- (a) Wheat flours are foods which, by definition of the Secretary of Health, Education and Welfare, have a moisture content of "not more than 15." (21 C.F.R. §51.1, et seq.)
- (b) Wheat flours like other products are hygroscopic which means that their moisture content fluctuates with changes in the moisture level and/or temperature in the surrounding atmosphere.
- (c) As a result of wheat flours' hygroscopic nature, a particular package of flour will vary in weight from time to time depending upon the relative humidity to which it has been exposed.
- (d) A package of flour will retain its original packed weight or gain weight when stored on a grocer's shelf in New York City when the relative humidity in the store is high. The same flour when stored on the same shelf will lose weight when exposed to low relative humidity.
- (e) A wheat kernel in its natural condition arrives at the flour mill with a moisture content of 10-14½%.

(f) Moisture is an essential element in the milling process. The purpose of moisture in milling is to toughen the outer bran coat of the wheat kernel (pericarp) so that the bran coat will flake rather than shatter in the course of the grinding and separating processes of the mill, thereby permitting a clean separation of pericarp from endosperm (the inner portion of the wheat kernel). Thus the moisture in properly tempered wheat is the essential catalyst which permits production of white flour with an acceptable ash specification and the efficient fractionation of the wheat kernel into a favorable distribution of the products of farina, flour, germ, shorts and bran.

(g) At the end of the milling process, patent flour is produced with a moisture content which ranges from about 13 to 14%, and whole wheat flour is produced with a moisture content from about 12 to 13½%.

(h) Packaging of flour by plaintiffs is totally mechanized. Weight control procedures have been established and are employed by each plaintiff to make sure that all packages of flour produced are full weight at the time they leave the mill.

(i) Plaintiffs stamp a code number on each package of flour at the time it is sealed. By referring to the code number, it is possible to determine when and where that package of flour was packed, as well as other quality control information, including moisture levels at the time of packing. Such information is available to interested weights and measures inspectors upon request.

(j) Although the net weight of packages of flour may fluctuate as a result of the atmospheric conditions which exist in good distribution practice up to and including the point of sale at retail, such fluctuations due to absorption or evaporation of moisture content (i) do not vary the

quantity of dry ingredients in the package; (ii) do not affect the flour's nutritional value; or (iii) do not affect the flour's economic value.

(k) Wheat flour manufactured, packaged and sold by plaintiffs, including the flour inspected by defendant and referred to in the pleadings, conforms to definitions and standards of identity set forth in 21 C.F.R. Part 15, sub-part A, promulgated by the Secretary of Health, Education and Welfare pursuant to 21 U.S.C. §§341 and 271.

(l) The labeling of all wheat flour manufactured, packaged, sold and shipped by each plaintiff, including the flour inspected by defendant and referred to in the pleadings, conforms to the applicable requirements of the Food, Drug and Cosmetic Act, the Fair Packaging and Labeling Act, and the provisions of 21 C.F.R. §1.8(b)(q) and §15.1 et seq.

(m) The inspectors of the Department (hereinafter at times referred to as "defendant's agents"), the administrative practices they follow, and the methods they employ in the performance of their duties are subject to the general supervision and control of defendant, The Commissioner of Consumer Affairs for the City of New York.

(n) On January 17, 1973, inspectors of the Department of Consumer Affairs visited the Bronx Consumer Co-op, 50 Van Cortlandt Avenue, West Bronx, New York. At that time and place, the inspectors weighed the net contents of 21 packages of plaintiff Pillsbury bleached and unbleached flour. The stated net weight of each of said flour packages was 5 pounds. At the time of the aforesaid inspection, the net weight of all 21 packages of flour was found by the inspectors to be less than the stated net weight. The inspectors advised the retailer to remove the packages from sale.

(o) On February 21, 1973, inspectors of the Department of Consumer Affairs visited the Atlantic & Pacific Tea Company, 41-25 Greenspan Avenue, Queens, New York. At that time and place, the inspectors weighed the net contents of 19 packages of plaintiff General Mills whole wheat flour. The stated net weight of each of said flour packages was 5 pounds. At the time of the aforesaid inspection the net weight of all 19 packages of flour was alleged by the inspectors to be less than the stated net weight. The inspectors advised the retailer to remove the packages from sale.

(p) On March 8, 1973, inspectors of the Department of Consumer Affairs visited the Pantry Pride Supermarket, 187-04 Horace Harding Expressway, Queens, New York. At that time and place, the inspectors weighed the net contents of 14 packages of plaintiff Pillsbury's all-purpose flour and 25 packages of plaintiff General Mills bleached, unbleached and whole wheat flour. The stated net weight of each of said flour packages was 5 pounds.

(q) At the time of the inspection referred to in paragraph (p), the net weight of all 14 packages of Pillsbury flour was found by the inspectors to be less than the stated net weight. The inspectors advised the retailer to remove the packages from sale.

(r) At the time of the inspection referred to in paragraph (p), the net weight of 24 of the 25 packages of General Mills flour was found by the inspectors to be less than the stated net weight. The inspectors advised the retailer to remove the packages from sale.

(s) None of defendant's inspectors ascertained or attempted to ascertain the original weight of the net contents of any of the packages referred to in paragraphs (n), (o), and (p), or what might have caused variations

from the stated net weights of the packages of flour in question or whether plaintiffs had or had not engaged in "good distribution practices."

(t) Of the 24 packages of General Mills flour referred to in paragraph (r) hereof, plaintiff General Mills was able to recover 13 packages alleged to be short weight by the inspectors. These packages were submitted by General Mills to the United States Testing Company of Hoboken, New Jersey, an independent testing laboratory, for the purpose of having that laboratory determine the weight and moisture content of the flour in said packages.

(u) The data resulting from United States Testing Company's analysis of the 13 packages submitted to it when compared with General Mills' records with respect to the moisture content of the 13 packages of flour when packed, demonstrates that each of the 13 flour packages had lost moisture in an amount in excess of the alleged variation in weight from that declared on the package.

(v) As a result of the inspections referred to in paragraphs (n), (o), and (p) hereof, notices of violation were issued by defendant alleging that Section 833-16.0 of the Administrative Code of the City of New York had been violated. On April 18, 1973, a Departmental Hearing was held to consider the alleged violations. At the hearing, William J. Condon, Esq., attorney for the plaintiffs herein appeared. For each package of alleged short-weight flour which had been offered for sale, penalties were recommended by the hearing officer at the conclusion of the hearing, pursuant to Chapter 36 Title "A" §833-22.0 of the Administrative Code of the City of New York. The proposed penalties were rejected.

(w) That Malcolm W. Jensen, when he served as Assistant Chief of the Office of Weights and Measures in

the National Bureau of Standards, prepared and wrote Handbook 67.

2. That each of the following documents exhibited with this Request is genuine:

(a) "A Study of the Net Weight Changes and Moisture Content of Wheat Flour at Various Relative Humidities," by C. A. Anker and W. F. Geddes, with C. H. Bailey, Division of Agricultural Biochemistry, Minnesota Agriculture Experiment Station, University Farm, St. Paul, Minnesota. (The study referred to herein was admitted into evidence as Exhibit P1 and a copy thereof appears in the volume containing trial exhibits.)

(b) Chart prepared by Professor A. V. Havens, Department of Meteorology, Rutgers University, demonstrating the mean monthly relative humidity at 1:00 P.M., compared to equivalent indoor relative humidity at 70° F. (data from Newark Airport 1942 to 1964). (A copy of this chart is annexed to the Reply Affidavit of Jerome J. Graham and appears at page 65a, *supra*.)

(c) Copy of the package control report prepared by the inspectors setting forth findings made as a result of inspection referred to in paragraph 1(n) hereof. (A copy of said report is annexed to the Answer as Exhibit "B" and appears at page 41a, *supra*.)

(d) Copy of the package control report prepared by the inspectors setting forth findings made as a result of inspection referred to in paragraph 1 (o) hereof. (A copy of said report is annexed to the Answer as Exhibit "C" and appears at page 43a, *supra*.)

(e) Copy of the package control report prepared by the inspectors setting forth findings made as a result of inspection referred to in paragraph 1(q) hereof. (A copy

of said report is annexed to the Answer as Exhibit "D" and appears at page 45a, *supra*.)

(f) Copy of the package control report prepared by the inspectors setting forth findings made as a result of inspection referred to in paragraph 1(r) hereof. (A copy of said report is annexed to the Answer as Exhibit "E" and appears at page 47a, *supra*.)

(g) Copy of United States Testing Company, Inc. report of test, dated April 3, 1973. (A copy of said report is annexed to the Complaint as Schedule A and appears at page 22a, *supra*.)

(h) Copy of chart prepared by D. B. Colpitts for General Mills dated April 19, 1973. (A copy of said chart is annexed to the Complaint as Schedule B and appears at page 25a, *supra*.)

(i) Contents of Handbook 67 entitled, "Checking Pre-packaged Commodities, a Manual for Weights and Measures Officials," published by the National Bureau of Standards, U.S. Department of Commerce.

3. That all facts and statements set forth in the documents referred to in paragraphs 2(a), 2(b), 2(g) and 2(h) hereof are true.

4. That all facts and statements set forth in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the Affidavit of Malcolm W. Jensen, dated December 6, 1973 heretofore filed with the Court are true.

WILLIAM J. CONDON
Attorney for Plaintiffs
420 Lexington Avenue
New York, New York 10017

OF COUNSEL:

CARPENTER, BENNETT & MORRISSEY
744 Broad Street, Newark, New Jersey 07102

Defendant's Response to Request for Admissions

Defendant, Commissioner of Consumer Affairs, by her attorney, Adrian P. Burke, Corporation Counsel, makes the following statement in response to plaintiffs' request for admissions served on March 28, 1974.

1. Admits the matter set forth in paragraph 1(a) on the assumption that the number "15" refers to 15%.
2. Admits that wheat flour is hygroscopic and its moisture content will fluctuate at certain joint or separate changes in the moisture level and temperature in the surrounding atmosphere, but denies that the moisture content of wheat flours necessarily fluctuates at all joint or separate changes in the moisture level and temperature of the surrounding atmospheres as set forth in paragraph 1(b).
3. Admits the matter set forth in paragraph 1(c).
4. Denies that all packages of flour will necessarily vary in weight when stored on a grocer's shelf in New York City when the relative humidity is high or low as set forth in paragraph 1(d), but admits that a package of flour stored on a grocer's shelf may vary in weight depending on the specific relative humidity, temperature, length of storage and other factors.
5. Objects to the matter set forth in paragraphs 1(e), 1(f), 1(g) and 1(h) on the ground that such matters as the moisture content, the milling process and the moisture content of flour when produced, the weight control and packaging procedures are immaterial to the only triable issue: whether defendant's application of its short-weight ordinance is an unreasonable burden on interstate commerce.

148a *Defendant's Response to Admissions Request*

6. As to paragraph 1(i), admits that plaintiffs General Mills, Inc. and The Pillsbury Company stamp a code number on each package of flour and that by referring to the code it is possible for plaintiffs to determine when and where that package of flour was packed, cannot deny or admit what other information the code number contains in that such information is exclusively within the knowledge of plaintiffs and has not been reported to defendant with respect to plaintiffs packages of flour and cannot truthfully admit or deny any matter set forth in paragraph 1(i) in that plaintiff Seaboard has not alleged the trade name of its flour products.

7. Admits the matter set forth in paragraph 1(j) except denies that fluctuations due to absorption or evaporation of moisture contents do not affect flour's economic value.

8. Admits the matter set forth in paragraph 1(k) to the extent it repeats the matter set forth in paragraph 1(a).

9. Cannot admit or deny the matter set forth in paragraph 1(l) since such matter is within the exclusive knowledge of the plaintiff and notes that plaintiffs' flour packages found to be shortweight may not be subject to federal jurisdiction.

10. Admits matter set forth in paragraph 1(m).

11. Admits matter set forth in paragraphs 1(n) and 1(o) except notes that the packages of flour found by the inspectors were not only less than the stated weight but *prima facie* unreasonably less than the stated net weight.

12. Admits matter set forth in paragraph 1(p).

13. Admits matter set forth in paragraph 1(q) except notes that *prima facie* the packages of flour were found to be unreasonably less than the stated net weight.

14. Denies that the net weight of only 24 of the 25 packages of General Mills' flour were found to be less than the stated net weight and admits that 25 of the packages of General Mills' flour were found to be less than the stated net weight but only 24 of the packages were found to be *prima facie* unreasonably less than the stated net weight.

15. Admits matter set forth in paragraph 1(s) and notes that defendant's inspectors do not have a duty to make any of the determinations set forth in paragraph 1(s).

16. Cannot admit nor deny the truthfulness of the matter set forth in paragraph 1(t) and 1(u) in that such matter is within the exclusive knowledge of the plaintiff General Mills.

17. Admits matter set forth in paragraph 1(v) but notes that plaintiff made no claim that the loss of weight was unavoidable and a result of ordinary and customary exposure to conditions that normally occur in distribution practices.

18. Objects to the matter set forth in paragraph 1(w) as immaterial and irrelevant to the only triable issue: whether defendant's application of the shortweight ordinance to plaintiffs' package flour imposes an undue burden on interstate commerce.

19. Admits that the documents referred to in paragraphs 2(a), 2(c), 2(d), 2(e), and 2(f) are genuine.

20. Cannot admit or deny whether the documents referred to in paragraph 2(b), 2(c), 2(g), and 2(h) are genuine.

21. Admits that the document referred to in paragraph 2(i) is genuine.

150a *Defendant's Response to Admissions Request*

22. Object to the matter referred to in paragraph 3 on the ground that Mr. Jensen's statements are immaterial and irrelevant and that the statements made have previously been ruled upon.

ADRIAN P. BURKE
Corporation Counsel of the
City of New York
Attorney for the Defendant

Municipal Building
New York, N.Y. 10007

/s/ Renee Modry
RENEE MODRY
Assisting Corporation Counsel

**Transcript of Trial
Before: Hon. Constance B. Motley**

(2) (Case called)

MR. HALPERN: May we approach the Bench for an informal conference to see if we can restrict or limit the issues?

THE COURT: Suppose we do that on the record. I was going to ask each side to make an opening statement with the view to setting forth as succinctly as possible what each side intends to prove at this time.

I previously rendered an opinion outlining the issues for trial and that appears on page 7 of the opinion, the bottom of page 7, the top of page 8.

Do you have something else in mind?

MR. HALPERN: No, your Honor, that would suffice just fine.

THE COURT: We will hear from the plaintiffs then the defendants can make a kind of opening statement if you choose to do so.

(3) MR. HALPERN: Yes, we would.

MR. BENNETT: As your Honor points out in the opinion filed in this matter on the motion for summary judgment, reserves an issue related to the interstate commerce aspect of our action and in that your Honor pointed out that it may be that the city ordinance unduly burdens interstate commerce and is therefore unconstitutional and you said plaintiffs will therefore be permitted on the trial of the permanent injunction to prove that the city ordinance is unnecessarily burdensome. In this connection they would have to prove first the ordinance as it is enforced imposes standards substantially more stringent than those of the applicable federal laws.

Furthermore, plaintiffs would have to prove that the municipal requirements exceeded the limits necessary to vindicate legitimate local interests, unreasonably favor local producers or constitute a legitimate attempt to control packagers beyond the borders of New York siting the Florida-avocado case.

We propose to do just that. We propose first, by the testimony of an expert, to show the nature of wheat flour, the nature of a grain of wheat, its moisture content, the purpose and nature of the (4) milling process. The fact that in order to properly produce family wheat flour, it is absolutely necessary to add some water to the wheat in what is called a tempering process and that it is absolutely necessary to maintain a level of moisture content in the wheat as it goes through the milling process.

So it comes out of the milling process, in the case of family flour, with a moisture content and this is uniform in the milling industry, of about 13½ percent and this is not an arbitrary percentage, the moisture is there for essential reasons. That flour is defined for federal purposes as not more than 15 percent moisture, therefore 13½ percent is well within the limit of the federal definition.

We will show by this expert the universal practice in this country of packaging flour primarily in paper bags which are not moisture proof or in the cotton sacks in some rare instances and that this is the only reasonable and proper way to package flour; that it is not commercially feasible or feasible in the interest of having good flour available to the purchaser to package flour any other way.

The flour, therefore, is hygroscopic, which means its moisture content varies, that the amount of (5) the varia-

tion is related to the relative humidity to which it is exposed from time to time and that the lower the relative humidity, the more moisture the flour will lose and this is also an unavoidable feature of the practices and procedures under which flour is universally packaged and sold and distributed in this country.

We will show that scientific studies have been made of the extent to which flour will gain and lose weight depending on the relative humidity to which it is exposed and that those studies have been checked and re-checked and that they are valid studies and that by the application of those conclusions to wheat flour which is packaged with a moisture content of 13½ percent or some other percentage in that area, it will appear that the loss of a substantial amount of weight when wheat flour is exposed for sale in the City of New York on grocery shelves under normal and proper conditions, is unavoidable.

We will also show that it is completely impractical to overpack, as a practical matter, those packages of wheat flour to the extent there cannot be any loss of moisture which will not exceed the limits imposed by the City of New York under its practices.

(6) We will show as a matter of law, the federal law and regulations do not permit overpacking to the extent it would be necessary to guarantee that a package of flour would not be in violation of the law as enforced by the City of New York. Therefore, there is a conflict between the New York law and the federal law.

We will show that if mills were compelled--we will also show that the flour here in question is interstate in that Buffalo mill from which some of it comes, ships flour to jobbers and warehouses in New York and elsewhere from which it is shipped on to other adjoining states, we

will show that some of the flour in question in this case was shipped into New York from Kansas and Montana, so there is no question there is an interstate aspect to this.

We will show that if these millers, assuming that it were practical were compelled to overpack their flour packages to satisfy the requirements of the City of New York, they couldn't pack just for New York. Their production systems are such that they would have to pack all flour to satisfy the requirements of the City of New York if they are to continue to do business in the City of New York which would, since they ship from Buffalo mills and other mills, ship all over the (7) country, would let them at a disadvantage because other states do permit losses of weight due to dehydration, as contrasted with New York. Either that or they would have to stop selling flour for consumption in the City of New York which I submit will be a clear burden on interstate commerce.

In more detail, we will show that this Handbook 67 on which the State of New York says it relies in enforcing its weight ordinance is misconstrued by the City of New York. What they do with it is something that was never intended and that the table that they use has no basis in real fact as they apply it.

THE COURT: I don't know that we are going to litigate those issues all over again. I thought we clearly defined the issues for trial when you read them a minute ago.

MR. BENNETT: That is right, your Honor, but I don't see how we can prove these issues unless the City is willing to concede all of this. We have served on them demands for admissions to which they haven't yet responded but unless they concede all of this and they haven't, they refuse to do it.

THE COURT: How does all that relate to the issues as defined?

(8) MR. BENNETT: It relates, your Honor, by showing that given the nature of flour as we will prove it, given the nature of the packaging and distribution of product by millers throughout the country, the enforcement of the New York City regulations as construed and as it is enforced by the City authorities, will unduly burden interstate commerce and is therefore unconstitutional.

We will show the ordinance as enforced imposes standards substantially more stringent to take your Honor's own words than those of the applicable federal laws.

THE COURT: That seems to me clear enough and I don't know how it could be made clearer as to what is indicated there. You would have to show that the ordinance in question is more stringent than the federal, applicable federal laws.

MR. BENNETT: We are prepared to do that.

THE COURT: Going to the second issue, plaintiffs would have to prove that the City's requirements exceed the limits necessary to vindicate legitimate local interest, unreasonably favor local producers or constitute an illegitimate attempt to control packagers beyond the borders of New York.

MR. BENNETT: I submit we can demonstrate (9) that your Honor.

THE COURT: I am just suggesting those are the parameters of the trial. Let's not go into anything the Court has already ruled out.

MR. BENNETT: Your Honor has not ruled on these facts as applied to the interstate commerce question which

your Honor has reserved and unless these facts are before the Court, there is no basis for the Court's finding that there is this burden on interstate commerce. If flour were not hygroscopic, it would not gain and lose weight when exposed to various conditions of relative humidity, there would not be any burden. You could pack a pound of flour or five pounds of flour in cans to the city and ship it here and there would still be five pounds of flour.

If you could package flour in vacuum tins the way we do coffee, you could package it in Kansas City and it would still be five pounds.

But in order to show why the procedures followed by the City of New York do impose a burden, we have to show the nature of flour and we have to show the package process and the distribution process which these companies actually follow. There is no other way to prove it.

(10) THE COURT: Have you concluded your opening statement?

MR. BENNETT: I will show also that the federal law does not permit overpacking in order to overcome shortages which result from dehydration. It does permit overpacking to the extent necessary to compensate for variations in the machinery, but it will not permit overpacking beyond that and in support of that, as a matter of fact, your Honor, I have and will hand up to your Honor in due course or whenever your Honor wishes to have it, a brief filed on behalf of the United States government as *amicus curiae* in a proceeding in the Ninth Circuit in California by Kauper, Assistant Attorney General, also over the signature of Gregory Hovendon, Chief, consumer affairs section, in which they clearly state the position of the United States government that overpack-

ing will not be permitted; that when the federal regulation says the package shall state the net weight, it means just that, no more and no less.

THE COURT: And we didn't rule out any evidence on whether the federal law permits overfill in this opinion.

MR. BENNETT: I don't think your Honor did. I think your Honor indicated that you needed some evidence (11) on that subject and I recall quite well of course, at the oral argument, this was one of the subjects that we discussed.

MISS MODRY: I believe page 10, your Honor.

We would object to this on the basis of a brief submitted in another case. There is nothing in the federal statute or in any regulations that specifically and expressly prohibit overpacking.

MR. BENNETT: Yes, there is, your Honor. The statute says the package shall be marked with its actual weight which means no more, no less. Then there is a regulation that there may be a variation for inaccuracies in the packing process, in the machinery. At least the Attorney General says that is what the law says.

THE COURT: First of all, as I have pointed out here in the opinion, you are suggesting some irreconcilable concept between the local ordinance and the federal statute and you claim it prohibited overfilling and as we have said, this would be the case if in order to comply with the local ordinance plaintiffs were required to overfill their packages in order to compensate for inevitable moisture losses in amounts which would place them in violation of federal statutes (12) and regulations. However, as plaintiffs have argued, federal law permits reasonable variations from stated weights. Plaintiffs have not offered

any support for their argument that overfill sufficient to avoid liability under the New York ordinance would be deemed unreasonable under federal statutes and regulations.

MR. BENNETT: May I respectfully suggest to your Honor that we did make that argument. We made it very vehemently and the fact is, the federal statute says that the labels shall be accurate.

May I read this one paragraph from the Attorney General's brief?

THE COURT: All right.

MR. BENNETT: The minimum weight label scheme which California has adopted might be regarded by some as having advantages. As a regime oriented to the individual purchase, it would assure each purchaser receive at least as much value as he thought he was getting. It is, however, not the system congress chose for this country. Instead, 21 U.S.C. 343 E commands that the weight stated be accurate, not underweight and not overweight; and there are several pages of exposition of that position here. As a matter of fact, the Attorney General ends up with the proposition that if moisture (13) content is not considered, the stated weight may be extremely deceptive and he argues here at length and for good reason, that the federal regulation, except for such variations as result from the packing machinery—there are reasons for it. They are all set forth here. We are prepared to during the course of the trial give you some indication of what those reasons are but I cannot, your Honor, understand why we should now be precluded from arguing and giving such evidence as we have that the federal law does require stated net weight except for the specified variation for inaccuracies in the packing process.

This is all part of the reason why the City's enforcement is a burden on interstate commerce.

If we are required to overpack substantially for New York, we would be violating the federal law.

THE COURT: How would you be violating the federal law?

MR. BENNETT: If we are required to overpack substantially for New York, the packing process as such, the distribution is such, the warehousing process is such that they cannot specifically pack for New York. This whole mill packs for New England, Pennsylvania. They would all have to be overpacked and if they would, (14) they would violate the federal law.

THE COURT: Which prohibits overpacking?

MR. BENNETT: Which prohibits overpacking and I have a witness here that can prove that beyond a reasonable doubt.

I have here Mr. Jensen who was in charge of the weight enforcement activities of the United States government for many years and who indeed is the author of Handbook 67 and who will not only state what the federal law is, but will explain to the Court why the federal law is as it is and why overpacking, except for variations in the packing process, is prohibited.

The variations in the packing process of course do not permit an average underpacking. Its individual packages may vary minimally either side of the line as long as the average of a particular lot or ship is stated at that weight.

Therefore I submit this is all very relevant and essential to our proof that the procedures of New York City constitute an unreasonable burden on interstate commerce.

THE COURT: Do the defendants care to make an opening statement or comment on the plaintiffs' proposed proof?

(15) MISS MODRY: The first question I have, Mr. Bennett has not mentioned whether or not the packages which were the subject of violations in New York City were labeled out of the state or in the state. Since there are many mills in Buffalo and a good deal of packaging does go in Buffalo, I suspect that there may not be interstate commerce involved here in this particular problem. There is nothing in the complaint that alleges where the packages that are the subject of violations or any packages that are the subject of any violations in New York City are packed or where they might be misbranded under the federal law and if they are packaged and labeled in Buffalo, I submit they are not subject to any federal law.

The second point I would like to make, I don't believe — I think you already ruled on the reasonableness of Handbook 67 in terms of the due process question and I don't think that question ought to be opened. We have explained that New York City does not require only that Handbook 67's variation be allowed, but that the flour manufacturers can come forward when there are violations and these are *prima facie* violations, and tell us, tell the City that the variations were unavoidable and a result of good distribution practice, and (16) I don't believe in any of the papers or any of the offer of proof as plaintiffs' attorney mentioned at all that they made any attempt to show that in fact the subject of the violations were unavoidable and were as a result of good distribution practice.

I don't think the milling proces is at all relevant to the question of the burden on interstate commerce. It is conceded that flour has a hygroscopic quality and it will

lose or gain weight depending on the temperature and depending on the humidity and if, for example, packages are lying in the sun for three hours, they are going to lose weight. That is not good distribution process. It has nothing to do with the milling. The fact it leaves the plant at 13 percent moisture and suddenly evaporates to suddenly zero, that has nothing to do with the milling practice. That has to do with how it is shipped, where it is stored, what length of time is it stored, how hot is the place in which it is stored. These requirements that New York has, I submit, are not a burden at all on interstate commerce, because Handbook 67 itself suggests that its standards which are guidelines only, be used by most of the states and I don't see anywhere that following our regulation will violate any other state's regulations.

(17) The same package packed for New York whether or not it is in interstate commerce that goes elsewhere will not be in conflict, I submit with any other law.

In addition, we intend to offer proof that consistently two of the plaintiffs, General Mills and Pillsbury are in violation of New York City laws and a third who is not a plaintiff, is consistently within New York City laws. Our inspectors have regularly made inspections and have made this determination.

The other point I would like to make, we are not suggesting, nor is there anywhere in our local law a requirement that plaintiff overpack, or that plaintiff use a different package than it is using or that it reduce its moisture content, or that it increase its moisture content. We are simply saying carrying out good distribution practices. Let our consumer know what he or she is getting within reasonable variations and if the variation, the 3/8 is unavoidable, you wouldn't be in violation. Just come in and tell us you did everything you could do to meet those standards.

Various times the short weight will result from flour leaking out or it may be poor paper. We are not telling you what to do. We are only telling you this is what we expect and should expect our consumers (18) to receive, the net weight.

Federal regulation prohibits in the labeling that the weight be stated as packed. The intention, therefore, of the federal law, is that the weight on the package be the weight that goes to the consumer and not the weight when packed. No qualifying words such as "When packed" are permitted on the package. That is part of a local law.

Under these circumstances, I submit that plaintiffs' proof as to the manufacturing process or what Mr. Jensen the author of Handbook 67 interprets the table to be is totally irrelevant to the question of the burden on interstate commerce.

MR. BENNETT: Should I reply?

THE COURT: You may.

MR. BENNETT: As far as the complaint goes, it is not true as Miss Modry suggested. We did not allege interstate commerce. We refer to the fact that we manufacture, package and sell wheat flour then we say each plaintiff is engaged in interstate commerce in so doing. In fact, some of the packages that were referred to in this complaint were packaged outside of the State of New York and shipped into New York and the mill in Buffalo in which other packages were produced, runs these (19) packages on a uniform basis upon packaging machinery which is the standard in the industry. There follows all the practices that can be followed to make sure that these packages are full weight when they are shipped by the mill, and that if we are going to have to

overpack substantially to satisfy New York, then we are going to have to overpack for everybody and if people who do not have to satisfy New York compete with us in those other states, we are going to be out of business, because there is no free lunch. If we have to overpack, the consumer will have to pay for the overpack, not only in terms of additional flour but in terms of possibly new machinery and new procedures. It will just cost the consumer more, but if we have to overpack in competition with people who do not meet or have to meet the requirements of the City of New York we will be at a great competitive disadvantage and I suggest this is an unreasonable burden on interstate commerce.

As far as the argument goes that we can defend ourselves in the municipal court when we are hauled in on violations from time to time because we haven't proved here there was good distribution practice, I cited to your Honor the only case I know of on this subject in New Jersey which holds that the burden of proof (20) is on the inspector to show that the package in question was not handled properly. It is not on the milling.

Moreover, we are not talking about spilled or broken packages. If there is a spilled or broken package, we are not asking this Court to determine that we have no responsibility or that our retailer has not responsibility for that. We are talking about intact packages, fully packed when shipped in interstate commerce in accordance with all federal requirements and regulations, which now we are charged with, in the City of New York, with selling illegally. I say that is burden on interstate commerce.

MISS MODRY: Just one or two more comments, your Honor.

It is insisted here there is some requirement in New York City that the plaintiffs overpack. There are probably

many different ways that they could cut down on the difference between the net weight and the actual weight. For example, not that I am suggesting this officially but a moisture free bag, a bag that doesn't allow the moisture to be lost would be a possibility.

We are not putting the burden of proof in the first place on the plaintiffs. We are simply adopting Handbook 67 as what we consider *prima facie*, an (21) unreasonable variation. We say that on the average if it is greater than, you show us that in fact you were engaged in good distribution practice. Any shortages shorter than that are not considered violations and every package is apparently coded with the name of the manufacturer and the place from where it is shipped and what lot it came from. This kind of knowledge is given to the violator so they could go back and check and see what happened, maybe they did shortpack, maybe they did make a mistake at their plant, maybe they distributed poorly. This is a reasonable requirement in order to see that the consumer gets what he is paying for.

The alternative to that would be no enforcement whatsoever that not only is flour a hygroscopic material, but any other food having a hygroscopic quality because all hygroscopic food is going to increase or decrease in weight to some extent depending on the relative humidity or temperature in the air and it seems most unreasonable to have City checkers or inspectors run around back to plants and check to see whether in fact this did go out properly and whether all along the way, all along the distribution point, it met good distribution practices and it would render local laws (22) completely unenforceable with respect to hygroscopic material.

THE COURT: What we are going to do in about five minutes or less is recess for lunch, then have you com-

mence with putting on witnesses, but what we want to avoid here, Mr. Bennett, is a trial of matters that are not here for trial as indicated by the opinion already and I had hoped to avoid any necessity for pre-trial order by defining them here and we don't want a replay of everything we have gone over and I have ruled upon and I suppose the best way to determine whether you are within the scope of the trial as to hear the witnesses as they go along and rule on the questions as they come up; but it seems to me that a lot of these matters which you have discussed I have already ruled on and this argument about the handbook and whether federal law prohibits overpacking or that kind of thing, I have already ruled on that.

We will recess now until 2:00 o'clock for lunch.

MR. BENNETT: May I raise one short matter. We served requests for admissions on the City and if they had been responded to favorably we could have saved a lot of time. They haven't been responded to at all (23) as yet.

THE COURT: Request for admissions?

MISS MODRY: They were served 30 days ago and they are due today, the request for admissions with respect to manufacturing processes—

THE COURT: In other words, you plan to answer them?

MISS MODRY: Yes, I do.

MR. BENNETT: May I ask when?

MR. HALPERN: We have them here now. They need one or two more typographical corrections.

THE COURT: Do that during lunch.

(Recess)

(24) AFTERNOON SESSION

2:00 P.M.

(Trial resumed)

THE COURT: You may proceed, Mr. Bennett.

MR. BENNETT: Your Honor, I call as my first witness, Mr. Arlin Ward.

ARLIN B. WARD, called as witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BENNETT:

Q Mr. Ward, where do you reside?

A Manhattan, Kansas.

Q What is your present occupation?

A I am a professor in the Department of Grain Science and Industry, Kansas State University.

Q Would you state your background and experience in connection with the flour milling industry?

A I graduated from the school Kansas State University in milling technology. After a period of time in the service, served with the Shellabarger Mill and Elevator (25) Company as an assistant milling superintendent. Later I went back to school and taught milling for five years and obtained my master's degree in milling technology. After that I joined the Pillsbury Company in 1951. I was a milling process engineer until 1954 as a milling department manager of the Pillsbury Mills in Springfield, Illinois which has three flour mills and a grain elevator. That job I held until 1959.

I returned to their headquarters of the Pillsbury Company and was in charge of their milling process development until 1961. At that time I returned to Kansas State University where I am now a professor teaching grain milling, feed milling and baking science.

Q Do you presently have any connection with any of the plaintiffs in this action?

A No, I do not have any connection with them.

Q Do you conduct a flour milling operation in connection with your work at the university?

A Yes. We have a complete small commercial flour mill. It's larger than some of the existing commercial mills in this country today, and it is in that mill that we do teaching, do the evaluation of wheats for the industry and for the growers of the United States and we also do research work there.

(26) Q Is that mill basically the same as the commercial mills operated throughout the country?

A Yes. It is identical to the commercial mills. In fact, the breaking system, reduction, sifting, was designed by many milling superintendents and almost \$1 million of equipment donated by the industry to replicate a commercial mill.

Q Will you describe briefly and in general the composition and nature of a grain of wheat?

MR. HALPERN: Objection. I believe at this point that the pleadings have indicated, and we have conceded, that at issue is not the composition of a grain of wheat or the manufacturing process as such. If this witness proposes to testify as to the manufacturing process, I submit that that is irrelevant to the issue before this Court.

THE COURT: The objection is sustained.

MR. BENNETT: I would like to make a tender of proof.

Q What is accomplished in the milling process in converting wheat to family flour?

MR. HALPERN: Objection.

THE COURT: If you are making this offer of proof, I would let you put it in for that purpose, but (27) the objection is sustained.

MR. BENNETT: What I am offering to prove, your Honor, in the milling process it is essential to add moisture to the wheat in its natural condition.

THE COURT: I don't know that that is disputed.

MR. BENNETT: I haven't seen it admitted.

THE COURT: Is that admitted?

MR. HALPERN: No, I would say that is not admitted, that it is essential to add water. I would submit they could do the process in some other way without the addition of water. I would admit the admission of water facilities the production but they could also do it without water in greater use of power in the separation process.

Q Is it possible in a commercial flour mill to produce family flour without the addition of moisture to the wheat in its natural condition before it goes through the milling and grinding process?

A Not as we know family flour in the United States or any other country that I am aware of and I have visited many countries. We add water to wheat to accentuate the differences between the pericarp, which we call the bran, the embryo which we call the germ (28) and the endosperm which is the floury portion. As we receive wheat in a mill that arrives between 11 and 12 percent

moisture most of the year, we add enough water to bring it up to 16 percent moisture, approximately 16 percent and let it rest for a period of time and man has not found a better way to do this yet. This allows us to make a grinding and sifting and purifying operation and separating the grainy portion from the germ and the endosperm. If we do not do this, add the water, we grind the bran particles and germ particles into flour which raises the mineral content and makes a poor color and also the bran particles act as a buffer in the bake so it is not acceptable as family flour as we know it today.

It is essential to make family flour as we know it by the process of conditioning grain and going through the many steps of grinding, sifting purification and in reducing it into flour.

MR. HALPERN: May I indicate we are refuting this but we still maintain it is irrelevant for the purpose of this trial.

Q Some of the moisture you add preliminary to the milling and grinding process, is it lost in the course of the milling and grinding process?

(29) A Yes. We want the moisture about 15-1/2 to 16 percent for the starting of the milling process. As we go through the milling operation, the product dries out some and as a result, most of the product end up around 13-1/2 to 14 percent moisture.

The first flour, of which there are three basic flours, is what we call a patent flour and that is what we call family flour or all purpose flour. That ends up at about 13-1/2 to 14 percent moisture in a normal milling operation.

Q Would there be problems in the milling operation if the moisture content of the wheat or the flour as it goes through were higher than the norm that is established?

A Yes.

Q What would those problems be?

A We are allowed to go higher but if we get it too high, we can't remove the endosperm from the bran as easily. As a result, much of the flour will end up in the brans and the shorts which goes to animal feed. Also we lose some of the protein which is what we are trying to strive and have in the flour and that also goes into the feed.

If we get it too wet, we don't get as much (30) flour and what we do get is lower in protein and we lose flour to feed and of course that raises the cost of what remaining flour we do make.

Q Would there be adverse consequences if there were too little moisture in the grain as the flour went through the mill?

A It's quite essential the amount of moisture we have in wheat prior to milling. If it's too dry, the bran and germ break up into small particles and go through flour cloth. This increases the mineral content or the ash and that is one of the specifications of family flours. Millers are milling to a certain maximum ash specifications and this bran and germ that ends up in the flour does not have gluten, does not have the properties that helps in baking and it acts as a buffer in the bake. Poor volume, poor color and unacceptable type bread.

Q If I understand you then, family flour comes out of the mill at about 13-1/2 percent moisture content, is that correct?

A That is approximately correct. It can be 13.2, 13-1/2, 13.8, 14, but most mills will come out about 13-1/2 moisture.

Q Is it packaged by the mills in their normal (31) operations and procedures at the moisture content at which it comes out of the mill?

A That is correct, yes.

Q Let's assume hypothetically that thereafter some of that moisture is lost through dehydration. Would that have any adverse effect on the nutritional value of the flour?

A No. The flour has the same amount of dry material, the same amount of nutritional material, the same amount of protein and solids. Whether the moisture is 13-1/2 or 17-1/2 or whether it's 10 moisture. It has the same amount of dry material.

As far as the baking performance, it's made up by the moisture that is added in the baking operation, whether it is a cookie, cake or bread.

Q When you say the same amount, do you mean volume or weight?

A Weight. I mean when we pack a product where you are allowed to have 15 percent moisture in the flour, that means there must have been 85 percent solids or dry material in a sack of flour. That never changes. It's the moisture that goes up and down. It can go up if the relative humidity is high enough surrounding the container or it can go down if it's lower, but the (32) dry material, the amount of protein, the amount of protein, the amount of solids, the amount of amino acids all remain the same. Those are not changed.

Q Would the physical volume of the flour be changed by a gain or loss of the moisture percentage?

A To the best of my knowledge, there is little difference if any in the physical volume. The number of cups

that are in a sack of flour, for example, but the moisture can be more or less.

Q Would the loss of the moisture content of the flour have any effect on its nutritional value—I asked you that—on the quality of the baked products that it is used for?

A No, there is no evidence in all the uses that family flour that is put to which is cookies, donuts, cake, different products. There is no problem and no difference between the end products whether it is from high moisture flour or low moisture flour.

Q I believe I heard a suggestion here this morning that the way to avoid the problem, the weight measures problem which arises out of the loss of moisture or gain of moisture is to pack the flour in moisture-proof bags.

Have you had any experience with that idea?

(33) A We have found that the paper bag, my experience with the paper and cotton bags works successfully and we have a long shelf life and no problems with aflotoxin or salmonella or any of these problems in a paper cotton bag. I do not have experience in metal containers or polybags where there is any success in storage of flour in such a container.

Q So you have no experience?

A I haven't any experience on the regular moisture flour that has been successful in a polybag. There has been some in a polybag and they had to perforate the bag to let the air in and out but I am not aware of successful stories in a polybag.

Q You mentioned some words that sounded like diseases that would result from the storage of flour in moisture-proof bags. I don't understand them.

A There are molds—

MR. HALPERS: Objection. I don't think this witness is qualified to testify to this.

THE COURT: Let me hear the question.

(Read back)

THE COURT: And the objection is he is not qualified as an expert in the packaging of flour, is that it?

(34) MR. HALPERN: In the type of diseases that could result, his having testified that he had no experience with plastic type bags and he is in the realm of speculation in the first instance and he has no expertise as to bacterial or other foreign contents in bags of flour.

THE COURT: What do you say to the objection to this witness answering that question?

MR BENNETT: He said these things happen if I understood the testimony, when the flour is packed in moisture-proof bags.

MR. HALPERN: What does he mean by these things happen. He can only testify from his own knowledge and experience. These things happen, is of no significance whatsoever.

THE COURT: If you are about to tell us what could happen in a moisture-proof bag—

MR BENNETT: I would like to get at that.

THE COURT: If the witness can tell us if he is qualified.

Q Are you qualified in your professional experience to tell us what happens?

A I am qualified to tell this.

MR HALPERN: Objection. Let him state what his experience has been, not just a conclusion.

(35) THE COURT: I thought he might tell us how he was qualified.

A We know in the history of packing flour—

THE COURT: No. The question is whether you are qualified by reason of your training and experience to tell us what would happen or might happen or could happen in a moisture-proof bag with respect to the development of certain diseases.

Do you have any training which says you are qualified to testify?

THE WITNESS: I am qualified to tell you what could happen in a moisture-proof bag.

THE COURT: What is that based on?

THE WITNESS: That is based on flour that has been—

THE COURT: We are getting at your qualifications, do you understand?

THE WITNESS: I have been an operating miller for a number of years as I mentioned and we have shipped flour in large bulk containers where we have condensation problems and there are mold growths. I have observed that. I am aware of some flour being packed in polybags and become lumpy. To what degree and the contamination, I am not sure, but the statement I made was, I am confident (36) and am sure that the shelf life of flour packed in paper and cotton has never ended up with the items I mentioned, the molds and the type of things I mentioned, the aflotoxin and salmonella.

THE COURT: I gather the witness would have to have some training in bacteriology, is that what you are suggesting?

MR. HALPERN: Yes, and actual experience. He says "I have heard". This is hearsay testimony. He has never packed in plastic bags. He has never personally seen the outcome of this type of packaging.

THE COURT: Do you have any training in bacteriology?

THE WITNESS: A very limited amount.

THE COURT: Then he is not qualified to answer the question.

Q Have you had experience with flour packed in plastic or moisture-proof bags? Have you observed what happens to flour packed in that kind of packing?

THE COURT: Number one, have you ever packed flour in moisture-proof bags, yes or no?

THE WITNESS: Yes.

THE COURT: What is the next question?

Q What adverse conditions happen from the packing (37) of flour in moisture-proof bags?

A I will explain the flour we packed in moisture-proof dried. We dried it down for the Quartermaster Corps at very low moisture. We packed it in 100 pound poly-bags. I have observed polybags with higher moisture that have turned green because of the mold inside of the bags but my experience has been packing flour dried exceptionally low, expensive flour for the government.

Q Now that we are on the subject—this flour was artificially dried, I take it?

A Yes.

Q Is that a process that is practical in connection with the production and marketing of family flour?

A I would say not, sir, no. It is dried for special purpose, for mixes for the self life of products such as cake mixes and things like that, but it is very expensive for the equipment and the milling industry. It is not tooled up to dry flour.

Q Do you know what the word hygroscopic means?

A Yes. Hygroscopic is a compound word. Hygro meaning water. Scopic meaning changing. Hygroscopic product such as wheat. Wheat flour is hygroscopic meaning it can take on water, changing, changing by taking on water or, under certain conditions, it can lose water.

(38) Q Do you have knowledge of how flour is affected by the relative humidity to which it is exposed?

A Yes. There is an excellent study by Anker, Geddes & Bailey, reported in Cereal Chemistry which shows the moisture loss or gain in packages under different relative humidities.

Q What authority does that study have in the milling industry?

A That is a classic article on the subject and it still reads well today. It was prepared back in the late '30s and reported in the early '40s and is still the reference that we used today in the academic world as well as in the industry for moisture pick up or loss under different relative humidity conditions.

Q Would you explain what is meant by relative humidity, with the emphasis on the word "relative"?

A Relative humidity is the percent of the saturation that is present in the atmosphere to which the expression is applied. For example, if 50 percent relative humidity means that at the time 50 percent or half of the water vapor that is present is what could be if it was fully saturated.

Q Does the saturation point of air vary with the temperature of the air?

(39) A Yes. The amount of moisture that can be carried in the air is dependent on the temperature. The higher the temperature, the more moisture that the air can handle.

Q Then if we have a constant moisture level in a cubic foot of air and the temperature of that air is increased, how would that effect the relative humidity in that cubic foot of air?

A The relative humidity would go down.

MR. HALPERN: I assume this is still in the offer of proof because I would make the same objection, that he is not qualified in this area as well.

THE COURT: Yes.

MR. BENNETT Your Honor, the Anker, Geddes & Bailey report to which Professor Ward has alluded has been before the Court already. It is a reprint from Cereal Chemistry and I believe in response to our demand for admissions, the defendant have admitted the authenticity of this study.

I would like to ask to have it marked in evidence.

MR. HALPERN: We have no objection to the submission of the report. It is just his testimony concerning the report.

(40) THE COURT: Is it attached to some pleadings?

MR. HALPERN: It is part of the record before the Court.

THE COURT: Let's agree it is already in the record.

Did you have a copy now?

MR. BENNETT: Yes.

THE COURT: The clerk will mark it.

(Plaintiffs' Exhibit 1 was received in evidence)

Q Professor Ward, are you familiar with the report just marked in evidence?

A Yes, I am.

Q Are you familiar with Table 9 which appears in that report?

A Yes, I am.

Q Do you have a copy of the report in front of you?

A Yes, I do.

Q Would you explain what Table 9 shows?

A It shows the percentage of overpacking required to insure 100 percent of the required weight at varying relative humidities. It has across the top the relative humidity, the flour moisture at equilibrium and the (41) percentage of overpacking required to provide full weight for flours packed at following moisture contents.

For example, if the bag was around an area of 10 percent relative humidity, the flour moisture when it would come at equilibrium would be 5.9 percent and if the flour was packed at 13.5 percent, it would require 8.8 percent overpack to assure that it had the proper weight in it at 10 percent relative humidity.

Likewise, there is another example that could be used. If the relative humidity was 70 percent, the flour moisture at equilibrium would be 14.5 and the flour that was packed at 13.5 moisture would pick up 1.2 percent moisture.

Q At an original moisture content of 13.5, is that correct?

A That is correct, yes.

Q Does this table show the percentages of overpacking required on the basis of an assumed relative humidity running from 10 percent through 80 percent at 10 percent intervals?

A Yes, it does.

MR. BENNETT: No further questions.

MR. HALPERN: Is it in order for me to cross examine on this offer of proof?

THE COURT: If you are objecting to it, I don't know why you would. He has a right to make an offer of proof and he has made it.

MR. HALPERN: I would submit—

THE COURT: On those portions that are relevant, you may cross-examine.

MR. HALPERN: If Appellate Court should decide that his testimony was relevant and should have been taken, I submit I should be able to cross-examine.

THE COURT: All right.

CROSS EXAMINATION

BY MR. HALPERN:

Q Professor Ward, did you tell this Court that the introduction of water in the milling process does not reduce the power cost to the mill of the milling process?

A I said that the addition of water was added to grain to toughen the bran and the germ and mellow the endosperm so it can be reduced in the flour and keep the bran and the germ intact. We don't add water to increase or decrease the power in the milling operation. That is not the objective of adding water to the grain.

Q Do you recall giving testimony July 7, 1965 in Trenton, New Jersey at the State House, in a case brought by Pillsbury Flour and General Mills against a Walter H. Kramer?

A Yes, sir.

Q I refer you to part of your testimony, Professor, in which you stated:

"We also add moisture"—

MR. GRAHAM: Could we have the reference?

MR. HALPERN: Page 10-A of the transcript.

MR. GRAHAM: May we show page 10-A to the witness?

MR. HALPERN: Lines 21 through 24, this is Professor Ward speaking.

THE COURT: Just a moment, he wants to let him look at it while you are reading.

Q Professor Ward, you stated "We also add moisture to the wheat so it will penetrate the endosperm and make it possible to reduce it in the flour with a minimum of power cost and also it is helpful to control the uniformity of the flour product."

A Yes, but that isn't the purpose we add the water to reduce the power cost. It does that but that isn't the reason we add the water to the wheat.

(44) Q It does have that effect?

A It does have some beneficial effect but that isn't the purpose of it. If we could do it some other way, the industry wouldn't be adding water to it just because of the power.

Q Professor, did you testify that you personally had some experience with packaging in plastic type or polyethylene type of containers?

A In polybags, in 100 pound polybags.

Q What were the circumstances of this type of packaging, was this packaging experimental on your part or was a required type of packaging that you had to meet?

MR. GRAHAM: Objection to the form of the question. It is two questions.

THE COURT: Try to break it down.

Q Was this an experimental type of packaging on your part?

A We fulfilled an order of flour for the Quarter-Master Corps which had a specification of very low moisture and the only way we could do that was to dry the flour then pack it right away in a polybag because it would pick up the moisture and wouldn't meet the specifications. That is the reason we pack it in 100 (45) pound polybags.

THE COURT: Because it would pick up moisture?

THE WITNESS: Yes. It would pick up too much moisture so we had to put it in polybags.

THE COURT: Read that answer again.

(Record read)

THE COURT: I don't understand it. You are saying you dried it out but put it in polybags because that would pick up moisture?

THE WITNESS: We put it in the polybags so it would not pick up the moisture.

THE COURT: That is what was wrong with the answer to that.

Do you want to read the answer again?

(Record read)

THE WITNESS: It would not pick up the moisture.

Q When you say "We" you are talking about the Pillsbury people at that time?

A Yes.

Q And you state that you did so package these bags, is that correct?

A Yes, sir.

Q Did you personally supervise the packaging of these bags?

(46) A I was in charge of the operations of the mills and all the operations. I personally did not package it but under my supervision, yes, sir.

Q Did you have occasion to inspect these bags after the packaging?

A No, sir. They were sent to the Quartermaster Corps. These bags that I am talking about dried to a very low moisture were shipped to the Quartermaster Corps in Chicago at the time.

Q And you never inspected these bags at any time after they were packed?

A No, sir.

Q Did you ever see any of these bags subsequent to that time?

A No, sir.

Q Then you don't know of your own knowledge as to what happened to the contents of these bags, do you?

A Not these particular bags, no, sir.

Q Were these the only bags you are referring to insofar as the polyethylene liners?

A I observed some that were packed in polyethylene bags in Holland but the flour had turned green inside of these polybags. I did not pack that flour but I did observe some they had tried in Holland in the year 19—(47) either 1963 or 1965, sir.

Q Were you personally familiar with the packaging operation in Holland at that time?

A No, sir. I have been through and observed the packing. I wasn't in charge of it but I observed it.

Q Professor, if I understand you correctly, you stated that the wheat comes into the mill with a certain water content, is that correct?

A Yes, sir.

Q And that water content would be about what percent?

A Do I understand the question to the mill or to the elevator adjoining the mill? It comes in from the farm or the elevator about 11 to 12 percent moisture. Then the mill cleans the wheat.

Q Is that by application of additional moisture?

A In the cleaning operation there is no moisture added but in the conditioning operation, water is added to the wheat to bring the moisture level from 11 to 12 up to approximately 16 percent moisture and allowed to rest for 16 to 20 hours so the wheat comes in equilibrium and again mellows the endosperm, toughens up the bran and the germ.

48 Q Does Pillsbury make any effort to reduce the moisture once it has increased the moisture before packaging?

A Not in the case of family flour, no.

Q Do they in the case of other flour?

A In the special flours to go into cake mixes and such items such as that where the shelf life would be shortened if they did not. They add other ingredients, sugar, shortening and other things and the shelf life is shortened if they do not dry the flour for that purpose. That is why it is dried.

MR. HALPERN: No further questions.

MR. BENNETT: I have nothing further from this witness.

THE COURT: Thank you, you may come down.

(Witness excused)

MR. BENNETT: I call Mr. William Johnson.

WILLIAM JOHNSON, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BENNETT:

Q Where do you reside?

(49) A 3330 McKinley Parkway, Buffalo, New York.

Q Where are you employed?

A General Mills.

Q What capacity?

A Plant manager. I am in charge of flour and elevator.

Q What has been your experience in the flour milling industry?

A My experience has been with General Mills. I started in 1953 in the accounting department first for five years. I entered the manufacturing department in 1957 and packaging and remained there in Amarillo, Texas until 1963 and became packaging and warehousing superintendent of the Buffalo facility in 1963 and I was in charge of packaging and warehousing in Buffalo until 1968 at which time I became plant manager in my present position.

Q What is the capacity of the General Mills plant at Buffalo of which you are superintendent in terms of yearly flour production?

A Yearly flour production?

Q Yes.

A Last year we produced 3.3 million hundred-weights. That would be 100 pounds per each hundredweight.

(50) Q 300 million pounds?

A Yes.

Q What areas of the country are served by your Buffalo mill?

A New York, New Jersey, Delaware, Rhode Island, the New England states and upon occasion during periods of the year, we may serve Cleveland, Pennsylvania and Baltimore, Maryland.

Q Do you on occasion ship flour to other states on occasion?

A On occasion, yes.

Q How is the flour transported from the Buffalo plant to its destination?

A That would be a shipment under the distribution channel?

Q Yes.

A By over the road trucks or rail car.

Q If you were shipping from Buffalo to New York City, do you know whether sometimes you would ship by way of the Erie-Lackawanna Railroad?

to New York City, do you know whether sometimes you would ship by way of the Erie-Lackawanna Railroad?

A It is possible. We use all routes available.

Q Do you know what routes the trucks take, if they deliver flour from your Buffalo plant to New York City?

(51) A We load two types of trucks. We may loan customer trucks or distributor trucks or jobber trucks. We do not have a distribution warehouse in the New York City area as such. We distributed from Buffalo.

Q Do you ship flour from Buffalo to jobbers or distributors in New Jersey who in due course re-ship to New York City?

A If they serve New York City, yes.

Q Do you ship to warehousers and jobbers in New York City who in turn distribute flour to Connecticut, New Jersey and other states?

A If their territories are such.

Q How many mills does General Mills have in the United States?

A Eight.

Q Where are they?

A In addition to Buffalo, New York, we have Johnson City, Tennessee, Chicago, Illinois, Avon, Iowa, Kansas City, Missouri, California, Vallejo, California.

Q Do you know if flour is shipped from those mills into New York City?

A I failed to mention one. Great Falls, Montana.

Q Let's start with Great Falls, Montana. Do you know if flour is shipped from Great Falls, Montana (52) into New York City?

(52) A Yes.

Q Have you examined the schedule which is attached to our complaint showing certain packages of flour which are specifically mentioned in our complaint?

A Yes, I have examined it.

Q Are you able to tell from the serial numbers with reference to those packagers, where those particular packages were packed by General Mills?

A Yes. The manufacturer, yes, the location of manufacturer.

MR. BENNETT: Mr. Graham, could you give him a copy of that?

Q Mr. Johnson, by looking at Schedule B which is annexed to our complaint, could you tell whether any of those packages—where those packages were packed?

A Starting at number 1?

Q Yes.

A You want me to tell the mill location?

Q Yes.

A Number 1 was produced and packaged in Buffalo.

Number 2, Kansas City.

Number 3, Kansas City.

Gold Medal unbleached which is number 4, 5 (53) and 6 are Buffalo.

The balance are Great Falls, Montana.

MR. HALPERN: If your Honor please, let the record show that he is reading from Exhibit B which is the Pillsbury brand, is that correct?

THE WITNESS: No, sir, General Mills brand.

MR. HALPERN: I submit that the reference made to the brand—would you show Mr. Johnson the exhibit again, please.

THE WITNESS: This states GMI flour samples.

Q What does GMI mean?

A General Mills Inc.

Q Mr. Johnson, you heard Professor Ward's testimony with respect to the process by which wheat is first tempered by adding water, then milled?

A Yes, I heard that.

Q Is the process in the plant in which you operate the same as described by Mr. Ward?

A Yes.

MR. HALPERN: Same objection to this line of testimony as we objected as far as Mr. Ward's testimony is concerned.

THE COURT: Let me understand specifically what you are objecting to now.

(54) MR. HALPERN: He is now testifying that the procedure in effect at General Mills is the same as the manufacturing procedure in the Pillsbury plant. We objected to the relevancy of that and by incorporation, we are objecting to the relevancy of this as well.

THE COURT: All right.

MR. BENNETT: May I correct something.

Professor Ward wasn't talking about the Pillsbury plant. He was talking about the plant which he operates at the University of Kansas, which he said was similar in all respects in the manner in which it was operated and the manner in which it tempered the wheat, to mills operated commercially throughout the country.

MR. HALPERN: We would object to any testimony insofar as the manufacturing operations is concerned.

THE COURT: All right, the record is clear, and this is an offer or proof as to the manufacturing process as in the case of Mr. Ward; is that it?

MR. BENNETT: Yes. To save time, rather than have him describe his own manufacturing process, to have him say it is the same one described as Mr. Ward and that is the question.

(55) A It is basically the same.

Q Does family flour come out of your mill at approximately 13-1/2 percent moisture content?

A Approximately 13-1/2.

Q Are the consequences of too much or too little water in the tempering process the same as those described by Mr. Ward?

A Yes.

Q At your plant and the consequences the same?

A It's basically the same. The same conditions exist.

Q What quality control procedure do you have at your plant to control the amount of moisture added and other quality aspects of the milling of flour?

A Beginning with the raw material which is the wheat, we take samples, wheat samples that are submitted to quality control and this wheat is placed into bins prior

to cleaning. After cleaning, additional samples are taken to quality control. Prior to drawing it to the mill. Then upon bringing it to the mill, we had a certain amount of moisture to bring it to approximately 16 percent moisture. Then we allow the wheat to rest prior to milling and that is in the manufacture.

Do you also want me to explain after the (56) manufacture?

Q You check the moisture content during the milling process?

A As the flour is processed, yes, hourly.

Q You do it every hour?

A Samples are sent to quality control each hour.

Q What happens to the flour as it comes out of the mill and before it is packaged, does it go directly to packaging machines?

A We automatically convey it to storage bins, then pack it—we distribute it to different packers.

Q Is the moisture content of the flour effected in any significant way while it is in storage?

A Not significant. One-tenth, possibly.

Q One-tenth of one percent?

A Yes.

Q Will you describe the type of packaging equipment that you use at your Buffalo mill?

A We pack family package sizes. We have two pound Hesser machines and we have five pound Hesser machines. One 10 pounds Bemus F & F machine and one 25 pound long packer.

(57) Q Is that as far as you know equipment which is generally used in the industry for packing family flour?

A There are two other types out. Many companies are using now a Smico packer and also Neumatic Scale makes a flour packaging machine.

Q Are the machines you use as accurate as any in the industry?

A The Hesser machine accurate? I would say they are all fairly accurate. They are mostly volumetric fill. Most of them are.

Q Could you tell us how the machines operate from the point of view of measuring the amount of flour that goes in with respect to closing the bags?

A There are basically two divisions. First the Hesser machine has a pre-printed paper that is sent to us on a control with possibly 2000, 2500 impressions, pre-printed impressions and we put this on a machine. It has mandrels which form the bag. Each bag is consistent. It seals the bottom and said seam. Then as it is in a circular mechanism which comes before the filling station, and there are two volumetric fillers. One possibly 3-1/2 pounds and the other trims it off to as close to the weight as possible and it is also controlled with a (58) volumetric —you could control the number of turns of the screw—the only way I can describe it is a screw. It turns in a rotating motion. You can add or subtract the number of rotations to control the amount of flour going into the bag.

It then moves to another circular section. It is vibrated at this point to settle the flour down into the bag then it goes through the sealing and folding mechanism of the top seal and the insertion of a coupon, then after sealing the package goes into a belt, top belt which holds the top down until it is glued then it goes across a check area.

Q I think that is a sufficient description of the machine.

What procedures do you take at your mill to check the accuracy of the amount of flour placed in the bag?

A The procedure primarily belongs to the packing department, the packaging department, where the line operator is responsible to weigh five bags in succession each 30 minutes during his shift.

The foreman or supervisor is also checking weighing, usually on an hourly basis and quality control makes unannounced checks through each department or each (59) packaging line which is packed in different sizes; normally at least twice a day.

In addition to that, the packaging superintendent may weight at times during a shift and these are all marked down on a weight control shift, any weights that are taken.

Q What is the policy of your company with respect to adjusting the machines so that packages do not come off the packaging line at less than stated net weight?

A In General Mills we talk of—first, we call the net weight of the package the declared weight on the package but we package to what we call standard net weight. This came about for many years. General Mills, the management made a decision that a standard net weight was necessary to compensate for any possible moisture loss between the time of packaging and the point of first delivery and this is referred to as standard net weight.

Then we have what is called target weight which compensates for the maneuverability since perfection has not been obtained yet in packaging machinery, and that is what we call target net weight on which we do capability studies within specified periods or after (60) an overhaul or anything like this of any packaging machine.

Q What is the objective of the establishment of the target weight?

A The object of target weight is to compensate for the standard weight program which has three operating rules. First, that the average of all the bags will comply with standard net weight. 85 percent will comply with standard net weight which is over and above what we considered declared. Then the other rule is that no more than 15 percent of the production can fall below standard net weight.

We therefore have check scales, all check scales on each line set at standard net weight which includes our, what we might call overpack, and it will register the number under the standard net weight and the number over the standard net weight on a shift or hourly with indicator lights as well as registers.

Q To what extent do you actually overpack to provide for contemplated loss of weight between the time of packing and the time the flour leaves the possession or control of your company?

A On a two pound package, it is .375 ounces. On a five pound, it is .5 or one-half ounce. On a ten (61) pound package, it is one ounce. On a 25 pound package, two and a half ounces.

In addition to that, we have machine variability which adds additional weight to counter machine deficiencies.

Q That would be the target weight problem?

A Yes.

Q Do you put a code number on each package of family flour that you package?

A Yes.

Q What information does that code number supply?

A The code number supplies the month of manufacture, the date, the year, the plant and the shift.

Q Mr. Johnson, you are familiar with Table 9 in the Anker, Geddes & Bailey report which Mr. Ward mentioned?

A Yes, I have seen that table.

Q And you will observe then on the basis of that table at a 13-1/2 percent moisture if the package is exposed to a 10 percent relative humidity, would it be necessary to overpack 8.8 percent to insure the stated net weight?

Is that your understanding?

A That is the way I understand it.

(62) Q Putting aside for a moment any legal considerations with respect to federal requirements for the stating of net weight, would it be feasible for you to overpack 6 or 8 percent of your packages to insure stated net weight under adverse climatic conditions where the relative humidity might drop to 10 percent?

A We would not be able to package it on the present Hesser machine that we have.

Q Can you say why that is so?

A We have a very short tolerance on the size of package compared to top seal and it is roughly 3/8 of one inch, which is not enough to allow for 6 ounces on a 5 pound bag, for example.

Q Would there be any problem on some of your other machines?

A It would be less of a problem on machines that do not make their own package.

Q Would there be a problem on the standard bag that you use on those machines?

A Quite possibly you would need a larger bag, yes, sir.

Q Let's assume that New York City requires that you overpack sufficiently to insure stated net weight at all times when the package is exposed for sale on a (63) retailer's shelf in New York City and further assume adverse conditions of temperature and relative humidity and assume to meet these adverse climatic conditions, you must overpack 5 percent to insure the stated net weight within the limits permitted by the City.

Does any other state which you serve require you to overpack to that extent?

A No, sir.

Q Is there any feasible method of isolating flour packaged for New York City from flour packaged at your plant and destined for other states?

A No, sir, there isn't. Once it is delivered to a distributor, we have no idea if he has territories in New York City or New Jersey or Delaware.

Q How about in your plant, would it be feasible to package separately for New York City?

A It would be an impossibility with the volumes that we produce.

Q In your opinion if as you say there is no feasible method of segregating packages destined for New York City from other packages, what would your mill do if it were required by New York City law to overpack to the extent of 5 percent or more?

MR. HALPERN: Objection within the objection (64) to the entire line of testimony.

THE COURT: I gather it is your contention that New York does not require overpacking, therefore it is irrelevant?

MR. HALPERN: In addition he is also being asked to speculate what he would do prospectively if something happened.

MR. BENNETT: It is a hypothetical question but I think it is within his area of competence.

THE COURT: The objection on the ground that New York does not require overpacking is sustained.

MR. HALPERN: Plus the fact there has been no testimony that he established the policy for the mill or that he is in that echelon of command within the company to make the determination where to or no to ship to certain areas.

THE COURT: What do you say to that objection?

MR. BENNETT: I know he doesn't make overall policy of the company. I am asking him for his opinion in his capacity as plant manager of that plant in Buffalo.

A If I may go back one moment when you asked if we could isolate for New York City. Another problem I was thinking of was the whole wheat flour which is (65) only made in Great Falls and self-rising flour which is only made in Kansas City along with some all purpose flour that ships into the New York City area. We would have no way of isolating that. That already compounds the problem of distribution.

Q What you are saying is, there is no method of segregation?

A I can think of none myself.

MR. BENNETT: Your Honor, on this objection that New York City does not require an overpack, I would like to be heard. What they say is, in view of the facts of life with respect to flour, you either overpack or you are in violation of our law and I submit that translates into a requirement by New York City, if you wish to comply with their laws, you have to overpack.

MR. HALPERN: We say no such thing. We don't concern ourselves one iota with the manufacturing process. We do concern ourselves with the flour as it is locked on the retailers' shelves for sale and the short weight there. We say to the retailer, that if this flour is short weight within the specifications of Handbook 67, this is only *prima facie* evidence of short weight. We say come forward and explain that you have engaged in good distribution practices, that you haven't—

(66) THE COURT: By distribution practices, you mean the packaging of the flour?

MR. HALPERN: I would submit that the distribution practice starts with the packaging of the flour, the shipping of the flour, with the storage of the flour, albeit in there facilities or in the retailers' facilities in the ultimate of placing the flour for sale on the retail shelf. I submit there are so many intervening processes and we say to the retailer at that point, your flour is presumptively and *prima facie* short weight. If you can show us you have engaged in good distribution practices which will absolve you, that it has been unavoidable, and that you cannot prevent the short weight, then you are not in violation, but if you can't establish the good distribution practice, this is the relevance and we ask them to come forth and establish it and that is why we maintain that all this testimony as to manufacturing is irrelevant.

We concede there is a water content in the flour. We concede there is a moisture content and evaporation—

THE COURT: Now that you have heard the City's position, Mr. Bennett, I will hear you on that.

MR. HALPERN: And I would submit one further (67) thing. To say that we are requiring them to overpack is the furthest thing from the truth.

MR. BENNETT: There is no other way to satisfy the law as you pursue and apply it.

I was very interested Mr. Halpern to say to us you come in and satisfy us that you have engaged in good distribution practice.

In the first place, the mills do not control what happens in the store. They have no knowledge what happens in the store.

THE COURT: He is not asking you to go into that.

MR. HALPERN: We don't proceed against the mill in the first instance. We proceed against the retailer. They have come in on behalf of the retailer and explaining their mill process which is completely irrelevant. We are proceeding against the retailer at his level for short weight and the mill comes in and tells us about their milling process which is completely irrelevant. We know the product is short weight. We asked an explanation why it is short weight. Have they abused the *prima facie* standards of short weight. That is why we maintain the manufacturing process is irrelevant. It is just the distribution process at this ((68)) stage.

MR. BENNETT: What it really boils down to is a burden of proof and as I pointed out to your Honor, the only authority on this subject points out that the burden of proof is on the inspector. It is easy enough for an

inspector to find out what happened in a store, how long it has been there, whether it has been stored over a radiator or hot air vent. That is something the inspector can ascertain and if the city would read Handbook 67 carefully and understand it, that is exactly what Handbook 67 says.

It says in dealing with the problem of loss of weight through loss of moisture, you look at the situation in which the flour has been stored in the store and you ascertain whether the merchant has or has not engaged in good distribution process. This table they rely on has absolutely nothing to do with loss of weight through loss of moisture. It takes care of the variances in the packing process.

Therefore I think what happens at the mills and what the mills do in the way of packing flour and distributing flour is very relevant to this problem.

You can't understand the problem without it. Therefore, I submit that this testimony and Professor Ward's (69) testimony is admissible. Somewhere in these responses to our demand for admission they say that they pay no attention to what happens in the store, the distribution process. They are not interested in it.

MR. HALPERN: It is just the converse, your Honor. Your Honor has already ruled upon this and the due process question.

THE COURT: Would you read back the last question.

(Record read)

MR. HALPERN: I am informed that the retailer will come in on his own. We are prepared to offer testimony that only as of recent date has General Mills come in or Pillsbury on behalf of the retailer but they offer nothing more than what they are offering here. They say nothing

with respect—we submit that General Mills or Pillsbury are the ones that code the product when it goes out. They know when it is shipped out. They are better able to trace the course of the product than we. It is their code number. They know the date that it is manufactured, the date that it is packaged, the date it is distributed to their own warehouse, the date that it is further distributed from their own warehouse to the retailer's warehouse and for them to (70) urge that this entire burden falls upon the City of New York would make the law a shambles. It would be unenforceable. We find the flour short weight. It could be attributable to a number of reasons.

THE COURT: What is the City's purpose in enforcing this ordinance?

MR. HALPERN: The purpose in enforcing this ordinance is to establish there is no short weight. That when the housewife comes in and buys five pounds of flour, they buy five pounds of flour and the flour is not short in net weight content, and we have pounds that are short weights. As much as two or three ounces.

THE COURT: And you feel this is attributable to what?

MR. HALPERN: We don't know. It could be attributable to one or many causes. We know we start out with a product of short weight. The burden is not upon us to establish why it is short weight. We don't package the flour. We don't store the flour. We don't know the type of package they use to package the flour. We don't know the type of facilities they have for storage. We don't know where their flour is stored or where it is handled. We wind up with the end product. They would place the entire burden upon us. We submit (71) the burden is just the reverse, your Honor.

THE COURT: You say in effect that you have come forward with a *prima facie* case. Here is a package which is short weighted. The burden shifts and the defendant explains why?

MR. HALPERN: Yes. This is what we have submitted.

THE COURT: I don't know we are having so much trouble.

Mr. Bennett, now that you have heard the City's position again, what do you say to all this evidence you are bringing in? About the milling process and so forth.

MR. BENNETT: That is the reason, unless there is some abuse of distribution procedures at the retail level, that is the reason the packages end up short weight. We are explaining it. We are explaining how we package, why we package, why we put it into paper bags the way we do which is standard procedure throughout the country.

THE COURT: Which explains why it can end up two to three ounces short, is that it? ,

MR. BENNETT: And it explains why you cannot guarantee why it wouldn't end up short or over. I think (72) we got into this discussion in connection with a statement that the City was not requiring us to overpack and I said they are requiring us to overpack because unless we do overpack and overpack substantially beyond the capacity of our machines—

THE COURT: We have got to the point where the City says it does not require you to overpack. Can we move from there?

MR. BENNETT: Let me read to you what Miss Modry said at one of the hearings before this Court.

The Court said "Do you suggest that they could take care of the moisture loss which they claim is responsible for the short weight here simply by understating the true weight by a few ounces?"

"Miss Modry: I don't think there is any doubt about it, your Honor."

That is exactly—that is a statement that we are required to overpack. The way to do it is to put more in the package than the label says is in the package.

MISS MODRY: I object to that. That is not the intention at all. Obviously it would be possible always to meet the requirements of New York City if they did overpack but there may be other ways to meet the (73) requirements.

There is nothing in New York City's local law that says they must overpack, they must use plastic bags. We are simply using a uniform. Handbook 67 which has been at issue here and saying there are lots of shortages that are not violations, but if you reach what a government agency has determined what as *prima facie* unreasonable, tell us why, and if you convince us that you have done everything you can and the shortage is unavoidable, you are not in violation of any of our laws with respect to flour.

THE COURT: What do you say to that?

MR. BENNETT: I say we have shown that we do everything that is reasonable. We mill flour the only way you can mill it and it comes out with water in it. We pack it the way it should be packed in order to avoid mildew and other things that would effect its nutritional value.

We distribute it properly to our customers and jobbers. What more can we do?

THE COURT: We haven't heard anything on how you distribute it to your packagers or your retailers.

MR. BENNETT: Our position is, your Honor, we are not responsible for what happens to it after it is (74) distributed to our customers and on that subject, you heard Mr. Johnson testify that they put in some overweight calculated to be sufficient to bring it down to stated net weight at the time it is sold by them in interstate or intrastate commerce from the time it leaves their possession.

Their policy and practice is to have it right on the stated net weight. They pack it overweight because they anticipate it will lose some.

THE COURT: The City then says it finds that it comes up two to three ounces short.

MR BENNETT: They say we are responsible. Yes, it does sometimes.

THE COURT: The City says show us that you are not responsible or you have done everything you can to avoid that. That is what they say. Are we on that by this testimony?

MR. BENNETT: That is what I think we are showing here this afternoon. We have done everything that is reasonably possible to assure that those packages are stated net weight at the time they are delivered by us to our customers and we are not responsible for what happens thereafter. That is the position.

THE COURT: You think that the shortage then (75) results from something the storekeeper has done, is that it?

MR. BENNETT: Yes. It happens while it is in his possession, and it happens because of something that God did, not because of something the storekeeper did. God

changes the relative humidity and I don't think General Mills or Pillsbury or anybody else can control the relative humidity of the atmosphere outside, or as we will show with a witness whom I plan to call, the much higher relative humidity when the air is brought inside.

THE COURT: Then you plan to call a witness who is going to tell us that the result of two to three ounces shortage found by the City comes about as a result of moisture conditions in the air, is that it?

MR. BENNETT: The Anker, Geddes & Bailey report shows that. If flour is exposed to 10 percent relative humidity, it will lose about 8 percent of its weight. I am going to bring in the head of meteorology of Rutgers University tomorrow morning who will testify what relative humidity is in New York City from time to time in New York City, what it is outside and what it is inside in a building heated at 70 degrees and when you put the two together, his testimony and the Anker, Geddes & (76) Bailey report, you will see as a result of the operation of natural forces on this flour which is properly milled and properly packed, there will be a loss amounting to 8 percent which is far more than anything that is complained about in these complaints and far more than can be properly packed on the machinery and equipment that these mills have.

THE COURT: An 8 percent loss is a much more substantial loss, I gather, than anything the City has found, is it?

MR. BENNETT: Very much.

THE COURT: What would be the relevance of bringing that in? The City has shown a two to three ounce loss, not an 8 percent loss.

MR. BENNETT: To show that the three percent loss is well within the range of losses that will occur beyond the control of these mills.

If through the operation of relative humidity you can achieve during the winter, and this happens mostly during the winter, a loss of 8 percent, then I think we have explained why some of these packages may be one or two percent short and the table they go by in this Handbook 67 doesn't allow an overpack. On a five pound bag, the maximum overpack is three-quarters of an (77) ounce and the loss on a five pound bag at 10 degrees relative humidity would be 8 percent which is over 6 ounces.

So, we suggest we have explained this loss.

THE COURT: What does that book say about an unreasonable loss? What in its view is an unreasonable loss?

MR. HALPERN: More than 3/8 of one ounce.

MR. BENNETT: Not an unreasonable loss. An unreasonable overpack—

THE COURT: What do they say about unreasonable shortage, I mean to say? What do they believe to be an unreasonable shortage that ought to be explained?

MR. BENNETT: They don't. Let me put my expert on and I will explain why it doesn't.

THE COURT: The book doesn't say anything about that?

MR. BENNETT: In this table it says that an unreasonable variation resulting from the variations in the packing machinery—

THE COURT: Minus what?

MR. BENNETT: On a five pound bag, 3/8.

THE COURT: Beyond this, it is explained?

MR. BENNETT: No. They say it is the responsibility (78) of the local inspector, not with reference to this table, but in another part of this brochure which deals with the problem of hygroscopic packages, this table has nothing to do with hygroscopicity. The problem of dealing with hygroscopic packages is dealt with at page 2 and it says that the inspector should apply his experience whenever he finds a short weight that apparently is the result of a loss of moisture. He should look around and see how the storekeeper has handled the situation. He should get some information—this deals not only with flour but hygroscopic foods in general. He should be informed about the moisture content of the food.

He should be informed about the—

THE COURT: The City if I understand their position says that would make this ordinance unworkable. They couldn't possibly do that.

MR. BENNETT: It might make it a little more difficult for them, I will concede, than if they simply go in and weigh a package and find on a five pound package it is more than 3/8 of an ounce short and haul you into court. I admit it might be more difficult for them.

THE COURT: Do you see something wrong with the City finding that you have a loss which exceeds (79) the reasonable variation there and saying you have to tell us why there is a greater variation on your part? What is wrong with that?

MR. BENNETT: I have to ask your Honor what you mean by reasonable variation.

THE COURT: I asked you to read what they considered an unreasonable minus variation and you said it was what, again?

MR. BENNETT: 3/8 of an ounce. These are errors in the packing process. This has nothing to do with the weight loss. I would say if an error is found in excess of that amount, then the inspector ought to attempt to ascertain what the retailer has been doing with the package.

THE COURT: And the City says that would be too burdensome for the City in the sense that they could not enforce that ordinance.

MR. BENNETT: That is what they say.

THE COURT: They say all they are required to do is put on a *prima facie* case in effect, showing that you are below that and the burden then shifts to you or at least you have the burden of going forward and explaining why your shortage is greater and explaining that and if it is acceptable, then the City will (80) accept it. What is wrong with that?

MR. BENNETT: We don't know what the retailer has done with this package.

THE COURT: You think the City ought to find out what he has done with it?

MR. BENNETT: The inspector is there. He can see how it has been handled on the shelf. Can see whether it is next to a radiator or hot air vent.

THE COURT: There are a lot of things that City inspectors inspect in New York. You think that they have more than the burden of showing *prima facie* that say the owner of a building has violated a building code requirement. You think they should go in and find out why and if he has done everything possible? Doesn't

the owner have some burden in showing why he is not in violation of the statute?

MR. BENNETT: Our position is they don't make out a *prima facie* case by a finding of *minur* or *plus*.

THE COURT: They claim they do.

MR. HALPERN: And your Honor has already so decided in the motion for summary judgment.

THE COURT: I don't understand. Why is there such a failure of communication?

MR. GRAHAM: Your Honor, the fact that the (81) City says that page 8 of the handbook is the appropriate variation doesn't make it so, particularly in the face of the handbook that says it isn't so.

The problem is, that the City makes no allowance whatsoever for the hygroscopicity of the product flour. When they go in and inspect, they apply a variation that has to do with how well the machinery used to package flour does the job. It has nothing whatsoever to do with the inherent essence of the commodity itself.

We have put on a whole series of witnesses here to demonstrate—there are very few products in the world. There are 15 percent and so defined as water. Flour is one of them. The City makes no effort whatsoever so take that into account and that is the problem in communication. They say we don't have to.

THE COURT: Let's hear them on that so we know what we are talking about. Is that so?

MISS MODRY: It is not. In the preface to this table that the City uses is a specific statement that the table refers to moisture loss.

THE COURT: Listen, so you can reply.

MISS MDORY: This precedes the table that refers to the 3/8 minus error as unreasonable for a (82) five pound package. It will be noted that the suggested plus or minus at each label quantity. This is an acknowledgment that packers must be allowed to overfill such packages as are susceptible of moisture loss.

At the end of the table there is also this statement.

"The figures offered above are suggested for the determination of the reasonableness of errors in individual packages." They should not be used as tolerance figures. They are suggested guidelines.

THE COURT: In other words, that has already taken into account the moisture situation, is that what you are saying?

MISS MODRY: Yes.

MR. GRAHAM: We have the gentleman here who wrote the book. His name is Malcolm Jensen.

THE COURT: And he is going to tell us that they are reading it wrong.

MR. GRAHAM: Exactly and he ought to know.

MISS MODRY: Excuse me, your Honor, I would like to respond to that. Mr. Jensen's affidavit has been part of the record. I believe it is attached to the statement 9-G which is submitted on the City's motion for summary judgment. On one of the questions, (83) the question was whether this Handbook 67 provided a rational basis for the ordinance and I think when your Honor ruled it did, it considered Mr. Jensen's statements about what Handbook 67 meant to him and I don't think it should be relitigated at this point.

MR. GRAHAM: We thought Mr. Jensen's affidavit was more than adequate but inasmuch as it wasn't, we brought Mr. Jensen himself. He will be available for

Miss Modry's cross-examination but he is here to testify what that book means and she can cross-examine him up and down the courtroom but the fact remains, he is the man that put the handbook together and if anybody ought to know what it means, he ought to.

MR. HALPERN: This is what we tried to avoid. We are relitigating the entire case. This handbook is addressed to the due process argument. We are here before you on an undue burden in interstate commerce and nothing else. This handbook has absolutely nothing to do with a burden on interstate commerce. The criteria for the burden was spelled out by your Honor in her opinion and I submit that is what we are confined to hear today. They are trying to relitigate issues that have been litigated.

THE COURT: That does seem to be the problem (84) here. It seems to be the problem that we are right back where we started at the beginning of this case.

MR. GRAHAM: Your Honor, I will concede the territory left on the battlefield is reduced but I don't see how the City can say that I can't talk about whether or not they are appropriately applying the handbook when it is the crutch on which they rest in denying, or in saying that they are not imposing an undue burden on interstate commerce.

THE COURT: Except that I have already heard it and ruled on it.

MR. GRAHAM: In connection with due process.

THE COURT: What does that have to do with interstate commerce?

MR. GRAHAM: Your Honor, if they are inappropriately applying that handbook, they are inappropriately

applying their whole regulation and if our dog has to wag to the tail of the City of New York, we are out of business wherever we do business.

THE COURT: Well, you say—

MR. GRAHAM: We are not here on a situation where some fly by night outfit that wants to rip off the consumer. We are concerned about our consumers. This is a situation where we have a severe problem. As I (85) understand the City's position, we have an ordinance, we don't care about your problem.

There are only certain alternatives available to us if you enforce this ordinance as the City construes it and what we are trying to tell you, they improperly apply a handbook. The ordinance says there shall be no variation whatsoever.

THE COURT: The point is, the handbook is only a guide as they have indicated.

MR. GRAHAM: I realize that but I didn't say that is the guide I used. They say that is the guide they use and they use it wrong.

THE COURT: They are using that guide and they are saying to you come forward and tell us why your product varies from these standards which we are using as a guide. There can't be anything wrong with that.

MR. GRAHAM: What I am saying to you, there is nothing wrong with guides, but the guide has to relate to the problem and the commodity being regulated and in this case, it is a hygroscopic commodity and the guide the City uses has nothing whatsoever to do with those products.

THE COURT: And my ruling is, the guide has (86) already taken that into account.

MR. GRAHAM: Your Honor, I understand your ruling with respect to the due process argument, but I besiege you to let us put on our witness on the due process question and at least make the record on the subject and it may well be that your Honor might change her mind not only on the due process question, but agree with us on the unreasonable burden on interstate commerce question.

THE COURT: Except that is not what we are here for. The time to have shown that was when we took this up earlier.

MR. GRAHAM: Your Honor, we put in as about a detailed affidavit from Mr. Jensen as we could under the circumstances.

THE COURT: And the City rested on that. We can't try any case where the Court hears it and rules then you have another trial on the same issue. Absolutely not. We can't conduct any trials that way or Court cases. We are past that.

MR. BENNETT: May I finish with this witness, then I will make my offer of proof.

THE COURT: Yes.

(87) DIRECT CONTINUING

BY MR. BENNETT:

Q Mr. Johnson, if you were required to produce a bag of flour which at the time it is offered for sale on the shelves of stores in New York City would never on the basis of this alleged table of unreasonable records be more than 3/8 of an ounce short on a five pound package, what would you have to do?

A We would probably change—well, first a large capital investment to replace certain machinery, possibly in packaging. There are several alternatives.

Q Would you have to overpack?

A Overpack would be one.

Q What would be the other?

A Artificial drying would be another. All are capital investment situations.

Q If you artificially dry, what would you have to do to make sure the moisture wasn't picked up after you packaged it?

A I haven't studied it that deeply yet.

Q Do you know any answer?

A It would possibly gain if you dried below a certain relative humidity in a certain area and we would have no way of knowing what area it would go to.

(88) Q What problems would there be in pricing your product if you had to dry it so it would never dry out below stated net weight?

A It would probably increase the price of the individual package.

Q Are there any other conclusions to the problem other than drying out or overpacking?

A No, sir.

MR. BENNETT: No questions.

THE COURT: We are going to have to recess this until tomorrow morning since I have another case.

MR. BENNETT: Your Honor, if there is no cross-examination, I would make a tender of the testimony that

I would offer for Mr. Jensen and I understand your Honor is prepared to rule against it and we are finished.

MR. HALPERN: I would like to cross-examine the witness.

THE COURT: Tomorrow morning. 10:00 o'clock.

(Trial adjourned to April 30, 1974 at 10:00 o'clock A.M.).

(89) APRIL 30, 1974 12:00 NOON.

(Trial resumed.)

THE COURT: You may proceed, gentlemen.

WILLIAM JOHNSON, resumed.

DIRECT EXAMINATION (Continued)

BY MR. BENNETT:

Q Mr. Johnson, you referred yesterday to this Schedule B annexed to our complaint and marked Plaintiffs' Exhibit 2 for identification.

I hand it to you again and call your attention to the code identification numbers in the second column.

Could you tell me what they signify?

A They signify the month of pack, day of pack, year of pack, plant it was packaged in, which was Buffalo, and when shipped.

Q Would it be possible to disclose by the code numbers, to ascertain from your company's records the moisture content of a particular lot or shipment of flour?

MR. HALPERN: Objection. This document has only been marked for identification. It is not in evidence.

(90) The defendant objects to the introduction of this document in evidence. It is completely irrelevant.

It contains certain lots that are not subject to the charge. We submit that the Exhibit D of the defendant's answer indicate the lot and the numbers of the package that were found to be short weight on March 8, 1973 at the Pantry Pride located at 187-04 Horace Harding Expressway.

This Exhibit B annexed to the complaint purports to be the report of the same packages located at the Pantry Pride and we submit that a comparison indicates there are lot numbers on the plaintiffs' exhibit that do not appear on the defendant's exhibit and are not subject to the short weight charge.

Therefore, we submit that this document is irrelevant and should not be introduced into evidence because it bears certain code numbers that were not found by Department inspectors on Pantry Pride shelves.

MR. BENNETT: I haven't offered the document in evidence. I am asking him to comment in general.

THE COURT: Then we are back to the elementary rule that he can't read from a document that is not in evidence.

MR. HALPERN: Precisely, your Honor. I will (91) submit that all testimony that he gave yesterday in regard to this document should be stricken from the record and, of course, I didn't object at that time because all of this is in an offer of proof.

THE CORT: Yes.

MR. BENNETT: The testimony that he gave yesterday doesn't relate specifically to this document. The testimony that he gave yesterday relates to practices in the mill and I simply used this document as a starting point.

Q So, today, without regard to this document, can you tell me what information can be ascertained by your company from the code numbers on its packages of flour?

A The month of pack, the year of pack, the day of pack, the plant it was packaged in and shipped.

Q With that information, does your company have records from which it is possible to ascertain the moisture content of the specific shipment at the time it was packed?

A Yes.

Q Would your company be willing to make that information, all of that information, including the information with regard to moisture content, available to local weight inspectors upon request?

A Upon specific request, yes.

(92) Q Mr. Johnson, do you know the basis of your company's pricing of flour?

A Yes.

Q What is the price based upon?

A The price is based normally on a per hundred-weight basis at 12½ to 14 percent moisture basis and out-of-pocket expenses of doing business in this kind of situation.

Q Is it based upon the assumption that the package—

A It is a hygroscopic substance.

Q Is it also based upon the assumption that the contents of the package are equal to the stated net weight?

A Yes.

Q What would be the effect upon your company's pricing policy if it were required to overpack substantially?

A It would add to the cost of doing business which would add to the cost of the flour.

Q Or if it were required in some manner to dehydrate the flour, what effect would that have?

A The same effect, add to the cost of doing business which would increase the price of flour.

THE COURT: What does overpack substantially mean to you?

(93) THE WITNESS: What does overpack substantially mean to me?

THE COURT: Yes.

THE WITNESS: Overpack is the standard net weight that management has allowed us or mandated that we put into the bag to allow for the possible, or compensate for the possible loss of moisture from the time it is produced and packaged to the point of first delivery.

THE CORT: Read that back.

(Record read.)

THE COURT: I don't understand your answer.

THE WITNESS: What I am saying is, it is an amount placed in the bag over and above the declared weight on the bag.

THE COURT: How much is that?

THE WITNESS: It varies by size, your Honor.

THE COURT: In a five-pound bag?

THE WITNESS: In our company, it is one-half ounce.

THE COURT: A half-ounce over?

THE WITNESS: It would be five pounds one-half ounce.

THE COURT: So every bag is initially so packed?

THE WITNESS: Every bag—85 percent of our (94) production of five pounds has to meet five pounds and one-half ounce.

THE COURT: Eighty-five percent of production? What does that mean?

THE WITNESS: We have a target weight that we work from. Our target weight includes standard net weight plus weight compatibility of the machine. It takes into account the variation of the machine which will add additional flour to the bag and a five-pound—for example, the declared net weight of a five-pound bag is five pounds. The standard net weight says we are to pack five pound one-half ounce.

We make compatibility studies on the machine regularly to see what is the variation on that machine, pluses and minuses. This comes to, on our five-pound machines, roughly another $2/10$ of an ounce as an average.

This means that the five-pound packages that we produce are really produced around five pounds point $7/10$ of an ounce but it can have variations above that and variations between $7/10$ of overpack and $5/10$ overpack.

We are not allowed to go 15 percent less than five pounds and one-half ounce, or we consider the line out of control from a statistical point of view.

THE COURT: That is what you mean by substantially (95) overpack?

THE WITNESS: Yes, ma'am, to meet the requirements.

MR. BENNETT: That is not what I meant by my question. I would like to clarify it.

THE COURT: If you packed the flour five pounds and one ounce, is that substantially overpacked, in your view? Five pounds, one ounce in every bag, is that substantially overpacked, in your view?

THE WITNESS: That would be over the weight compatibility, over our target net weight at this time.

THE COURT: And the reason for allowing the one-half ounce over is what?

THE WITNESS: To allow for the possible loss of moisture between packaging and the first point of delivery.

THE COURT: And not variations in the scale?

THE WITNESS: No, ma'am. The variations in the packaging process are taken care of by the machine compatibility studies.

THE COURT: And you said that might result in a fraction under five pounds?

THE WITNESS: It would result in an additional roughly, 2/10 added to the bag to guarantee the five pounds one-half ounce.

THE COURT: In other words, it would never come (96) out under exactly five pounds?

THE WITNESS: No, ma'am. We have automatic check weigh scales at the end of the line that are set on five pounds one-half ounce and they will remove the bag from the line physically.

THE COURT: So you put in an extra half-ounce for moisture?

THE WITNESS: Possible moisture loss between packaging and the first point of delivery.

THE COURT: What is the possible moisture loss, what is that apt to amount to?

THE WITNESS: This is what statistics have told us is normal or what we should consider.

THE COURT: What statistics?

THE WITNESS: The studies we have made. Not I personally.

THE COURT: They show that it is apt to lose a half-ounce due to moisture, is that it?

THE WITNESS: To insure the fact it is declared weight to the first point of delivery which is five pounds.

THE COURT: The question is, do you put in a half-ounce more because your studies show that the bag is apt to lose half an ounce as a result of moisture?

THE WITNESS: To the first point of delivery, it (97) is to ensure that it weighs five pounds declared weight at the first point of delivery.

It might possibly weigh five pounds four-tenths of an ounce. It is according to the storage time, which are all taken into account in the statistics.

BY MR. BENNETT:

Q Do you add anything on the basis of statistics and your company's knowledge of weight variations in flour? Do you add anything in the packing process to make sure that the package will always be stated net weight when

it is on a grocer's shelf, no matter what the storage conditions are or how long the storage conditions are?

A No. We compensate for the possible moisture loss between packaging and the first point of delivery.

Q My question is, if you did, if you were permitted to and did put in enough extra flour, extra weight to guarantee that a package would never be understated net weight on the grocer's shelves regardless of the condition of storage, how would that affect your price structure?

A On a lesser machine, we would be unable to add that much weight if some of the figures I heard yesterday were reality without spending capital, adding to the cost of doing business.

Q Is your answer, then, that it would substantially (98) increase the price you would have to charge for your flour?

A Yes.

THE COURT: When you say substantially increase the price, what do you mean?

THE WITNESS: It would have an effect of what we found as necessary to add to the bag, the quantity, to insure that net weight of five pounds would be sustained on the grocers' shelves, and I don't know what that might be.

It could vary due to relative humidity and temperatures, et cetera.

THE COURT: The question is, what do you mean by substantially increase the cost?

Q The question is, how would it affect the price structure if you had to overpack and were allowed to

overpack to meet the maximum loss of moisture in a package that can occur on a grocer's shelf, not just a half-ounce, on the basis of the figures that went in yesterday where it could be quite a few ounces? Would that compel the company to increase its price?

A The ounces I heard yesterday or the moisture I heard yesterday would constitute two to three ounces possibly which we could not put in the machinery at this point and, secondly, that would mean that for every five-pound bag, we would be forced to add something in our (99) pricing that compensated for three ounces.

THE COURT: Like what, add what?

THE WITNESS: Instead of 100 pounds, we would be basing our price higher because it was taking more flour to make 25 pound bags, which is a 100 pounder. Instead of 100 pounds plus the half-ounce, we would be talking about 100 pounds plus an unknown "X".

THE COURT: Let's assume it is a half an ounce

THE WITNESS: That is what we are pricing it now, five pounds and a half-ounce.

THE COURT: How much more would it add to your cost if you did it at an ounce instead of a half-ounce? How much more it add to your cost?

MR. BENNETT: That is not my question.

THE COURT: That is my question.

THE WITNESS: It would add the cost of ten ounces of flour.

THE COURT: On 100—

THE WITNESS: On 25-pound bags.

THE COURT: And ten ounces of flour is costing what? Is this based on anything at all? Are you telling me that it adds substantially to your cost? I want to know what that statement of yours is based on.

THE WITNESS: When I said the word "substantially" (100) yesterday, I heard figures that it would possibly take four to six ounces per bag on the grocer's shelf.

THE COURT: Where did you get those figures?

THE WITNESS: I computed them in my mind from an 8 percent moisture basis or 9 percent moisture basis and I figured 80 ounces in a bag of five pounds at 8 percent moisture is six ounces.

THE COURT: Have you ever had any such experience with loss of moisture up to eight ounces, such as testified about yesterday? Have you had any experience at all?

THE WITNESS: I have heard of flour on the shelf between ten and twelve percent moisture.

THE COURT: Where have you heard it?

THE WITNESS: From the company offhand, in the dry areas of the country.

THE COURT: Your company doesn't have any actual evidence from its own experience of any such water or moisture loss up to eight ounces, is that a fact?

THE WITNESS: Not to eight ounces, no your Honor.

THE COURT: Do you want to cross-examine this witness?

MR. BENNETT: Your Honor, I think—

THE COURT: You are not concluded? I thought you had finished.

(101) BY MR. BENNETT:

Q Your testimony was based on the Anker, Geddes & Bailey report which was offered in evidence yesterday, was it not?

A Yes, Schedule 9, I believe.

Q Your area of responsibility in the company does not include checking weights on grocers' shelves, does it?

A Definitely not.

Q Have you ever checked weights on grocers' shelves?

A No.

Q Therefore—

A Most states and cities understand it is hygroscopic.

Q Therefore, you don't know of your own knowledge, do you, the extent to which flour produced in your mill has dehydrated on a grocer's shelf?

A No, I don't.

CROSS-EXAMINATION

BY MR. HALPERN:

Q But you are aware this flour does dehydrate on a grocer's shelf?

A I am aware it possibly loses moisture after it is packaged, yes.

Q And you are aware that the moisture content when (102) it leaves your plant is approximately fourteen to fifteen percent?

A It is approximately thirteen and a half to fourteen percent as packaged.

Q In order to compensate for this weight loss, you overpack one-half of one ounce?

A On a five-pound bag, our standard net weight is five pounds one-half ounce to compensate for the possible moisture loss that occurs in packaging to the first delivery.

Q To compensate for moisture loss, that can be anywhere from 1 percent to 13½ percent?

MR. BENNETT: He didn't say that, your Honor.

MR. HALPERN: I am asking that question.

THE COURT: It was 8 percent, I thought, from the report on which he relied, 8 percent of the weight content of the package. Does that refer to that, 8 percent of the weight content of the package?

MR. BENNETT: The table to which specific reference was made, your Honor, is Table 9, which shows that at an assumed relative humidity at 10 percent and an assumed initial moisture content of 13½ percent, it would be necessary to overpack 8.3 percent. That is the overpack.

(103) THE COURT: To compensate for moisture loss of what?

MR. BENNETT: The moisture loss which would occur if that flour were exposed to a relative humidity of 10 percent. The moisture loss presumably would be in the area of 8.8 percent because the overpack would have to be that.

THE COURT: I was talking about the weight loss.

MR. BENNETT: It would be approximately 8.8 percent. Mathematically, it would not come out to that if

you are talking about the loss on the other side of the stated net weight. That is what the table shows, your Honor.

THE COURT: That there could be a weight loss of 8 percent of the contents of the package, 8 percent of weight?

MR. BENNETT: That is right.

THE COURT: And that would have to be an area where there was at least 10 percent humidity?

MR. BENNETT: Yes. The table runs in intervals of ten degrees. At 20 percent relative humidity, the weight loss would be approximately 6 percent.

BY MR. HALPERN:

Q Mr. Johnson, you testified your overpack one-half (104) of one ounce on each bag of flour that goes out.

A I testified that is the standard net weight. We also have target net weight.

Q If you please, just answer my question.

MR. GRAHAM: Your Honor, he asked him what his testimony was. He mischaracterized the testimony and the witness is trying to tell him what he testified to and now he has interrupted him.

The Witness did not testify as the questioner suggested he did. The witness is trying to tell him exactly how he did testify and the questioner has interrupted him again in the middle of an answer.

I suggest if the questioner is truly desirous of finding out what he said, he should finish his answer.

MR. HALPERN: Than I submit the answers are not responsive.

THE COURT: Let's hear the question.

(Question read.)

MR. GRAHAM: I object to the form of the question. It does not properly characterize the witness' testimony.

MR. HALPERN: I will withdraw and rephrase it.

Q Did you tell us the net weight of the package of flour as they are packed at your plant and ready for (105) distribution?

A What size?

Q Five-pound bag.

A We shoot for a target net weight of 5.68 ounces.

Q You say you shoot for that. What is the actual weight when it leaves the plant?

A That is, 85 percent of our production is at that target.

Q Do you have inspectors from the Federal Food and Drug Administration conducting inspections at your plant?

A Yes.

Q Do they inspect these bags of flour?

A Yes.

Q Have they ever issued a violation to you for an overpack?

A No, nor an underpack.

Q I believe you testified that the General Mills plant which is located in Buffalo services the New York area with family type flour, is that correct?

A It services New York plus other states. New York is served by several of our plants.

Q I refer you to the type of flour that is found on the grocer's shelf.

What type of flour would that be that is found on (106) a grocer's or supermarket shelf?

A You mean General Mills brands?

Q Yes, General Mills bands.

A In a five-pound package?

Q Yes.

A You would find General Mills All-Purpose Flour. In some stores General Mills Self-Rising Flour, or Gold Medal is the brand name. Gold Medal Whole Wheat Flour and Gold Medal Wondra.

Q Could all these flours be characterized as a family flour?

A Yes. In my own mind, I would only have a question with whole wheat. I consider family flour an all-purpose flour for my own interpretation.

Q But these are all family flours?

A Sold to the family, yes.

Q I believe you also testified that your General Mills plant ships flour to a New Jersey distributor who in turn reships it to the State of New York, is that correct?

A We ship flour to a lot of distributors located around New York. We do not have a distribution point that is sponsored by General Mills per se. It is sold to a customer who brings it into this area.

Q You sell to distributors in the New York State (107) area as well?

A Yes.

Q Do you know of your own personal knowledge whether any distributor that General Mills ships to outside of New York redistributes that flour in the New York area?

A To my own personal knowledge, I would have to say no. We do not have any control over where they ship it, from Grand Union or any one of those stores, wherever their warehouses are located.

Q I show you this package and ask you if you can identify it.

MR. GRAHAM: Objection. The package was not any part of the direct testimony in this case. It goes well beyond the direct testimony. It is improper cross.

THE COURT: I don't know what he is going to ask him about the package.

MR. GRAHAM: I have no idea either. The fact is that no mention was made of any packages in the witness' direct testimony.

THE COURT: I thought we have been talking about the weight of those packages for at least a half-hour now.

MR. GRAHAM: What packages?

THE COURT: Five-pound packages of flour.

MR. GRAHAM: Yes. Specific packages of flour we (108) have not been talking about.

THE COURT: Overruled.

Q I show you this package and ask you if you can identify it, sir.

A It is a five-pound package of Gold Medal Flour.

Q Is that the type of package that is manufactured and distributed from the Buffalo plant in General Mills?

A No, sir.

Q Could you tell us where this package comes from?

A No, sir.

Q Does it have a code on it?

A No, sir.

Q Do all packages of flour that leave your mill have a code on them?

A Yes.

Q And this package does not have a code on it?

A It does not.

MR. HALPERN: I ask this be marked for identification.

(Defendant's Exhibit A marked for identification.)

MR. GRAHAM: May I ask the witness a question with respect to this package?

THE COURT: Yes.

(109) VOIR DIRE EXAMINATION

BY MR. GRAHAM:

Q Mr. Johnson, can you tell us what that is?

A I didn't observe that. It is a code mark. It was all mashed up. I guess the inspectors mishandled it.

BY MR. HALPERN:

Q Would you indicate where the code date is?

A This was produced in Buffalo.

MR. HALPERN: I offer this package in evidence.

MR. GRAHAM: He is offering a package of flour in evidence on my case? I don't understand the procedure.

You allowed him to question the witness with respect to a question of package, I gather, on the ground that the witness talked about five-pound packages of flour in general.

We have a specific package of flour. I don't know what Mr. Halpern has in mind with this package. I don't want to clutter up my case. He has his turn. Let him put in his package of flour on his case, not my case.

If he has any questions of the witness with respect to that specific package of flour, let him ask him and I can make my objections as we go along, but I think to put his package of flour in evidence on my case is a procedure that I am totally unfamiliar with.

(110) THE COURT: I am not. Overruled.

(Defendant's Exhibit A for identification received in evidence.)

BY MR. HAPERN:

Q Mr. Johnson, in your opinion, is this a representative package that would come from your General Mills plant?

MR. GRAHAM: I object to the form of that question unless the examiner states what he means by a representative package.

Q Is this the type of package that comes out of your plant in Buffalo? ¹

MR. GRAHAM: Again I object until I find out what he means by the type of package. Is he talking about the paper, the label on the package?

Q I am talking about the package and asking the question, did this package come out of your General Mills plant in Buffalo?

MR. GRAHAM: Did the package come out of the mill in Buffalo, the witness testified it did.

Q I ask you to refer to the code number and indicate the location of the code number on that package.

A What do you mean by indicate the location?

Q Where is the code number on that package?

(111) A On the bottom.

Q Is that code number obstructed in any way?

A No.

Q When you were given this package originally, you could not find this code number.

A I didn't realize, the package was all wadded up the way you had it. You had mashed the bottom.

Q Didn't I hand it to you?

A This was mashed in.

MR. GRAHAM: Are we getting into the area of harassing the witness?

There is a code number on the package. I saw it, Mr. Halpern saw it. The witness didn't.

THE COURT: Yes.

Q Mr. Johnson, I now squeeze this package and I notice that there is a certain white powder emanating

from the package, is that correct? You have it on my coat sleeve.

A I didn't put it there.

Q I put it there by squeezing the package.

A You are mishandling the five-pound bag of flour. I don't think the normal—

MR. GRAHAM: King Kong could not do a better job of what Mr. Halpern is doing to the package. Is this (112) appropriate cross-examination?

THE COURT: Where are you going?

MR. HALPERN: I am submitting that we have a porous package of which white powder is emanating from.

THE WITNESS: Any paper bag after it gets the treatment you are giving it, plus it was already mashed up when I saw it, would emanate some white powder, including talcum powder or any type of powder in a bag.

Q Is it your opinion these bags of flour require special handling during distribution?

A Not necessarily. They are baled. They are in bales.

Q Do you issue special instructions to distributors and retailers on how to handle these bags of flour?

A I am not in distribution. I am in manufacturing. I do not.

Q Do you know if anyone in distribution issues such instructions?

A I am not aware of it.

Q Mr. Johnson, I now show you Defendant's Exhibit D attached to the answer which indicates a package con-

trolled report prepared by the Department of Consumer Affairs indicating that a location of Pantry pride at 187-04 (113) Horace Harding Expressway, Queens, on March 8, 1973, an inspector from the Department of Consumer Affairs made an inspection of Gold Medal Flour and found violations of some 24 packages bearing code numbers listed on this report, and ask you if, looking at these code numbers, you could tell us whether all these bags of flour came out of the Buffalo mill.

MR. GRAHAM: May I see the report, please.

MR. HALPERN: Here is the original report.

Would you read back the question.

(Question read.)

MR. GRAHAM: Your Honor, the only problem I have is the record, and I don't see 25 code numbers on that report.

I have no basic objection to the question as long as we break it into two parts: namely, let's talk about the code numbers and identify them on the report. Then let's relate them to the packages if that is possible. I don't know that it is, but I think the question is confusing.

THE COURT: There are not 25 numbers on it?

MR. HALPERN: There are. I will refer to the code numbers.

Q I refer to the code numbers on this exhibit and (114) ask you if you can read the code numbers that appear on this exhibit.

THE COURT: And tell us whether they come from the Buffalo plant.

A Which are the code numbers? Maybe I could read your copy better.

Q I submit this is the original.

A Which code numbers do you have reference to?

Q F-2082. Does that come from the Buffalo plant?

A No.

Q F-20322. Does that come from the Buffalo plant?

A No.

Q E-203E?

A E-203E?

Q Yes.

A Yes.

Q E-21621 come from the Buffalo plant?

A Yes.

Q What is the distinguishing letter or numeral that indicates that it doesn't come from the Buffalo plant?

A It has an absence of the Buffalo plant code.

Q Which is what?

A E.

THE COURT: I thought you called some numbers (115) with F?

MR. GRAHAM: He did. He said they weren't from the Buffalo plant, your Honor.

Q Do you have any idea as to what this code means, F-2082?

A No.

Q Do you have any idea from what plant that would come from?

A No.

MR. HALPERN: No further questions, your Honor.

MR. BENNETT: Nothing further, your Honor.

THE COURT: Thank you, you may come down.

(Witness excused.)

THE COURT: At this time we will take a brief recess.

(Recess)

THE COURT: Ladies and gentlemen, I am very sorry that this sentencing session took much longer than I had anticipated and the reporter has been here all this time and he has to have a rest.

What we will do now is to recess now until 1:10. That will give us 50 minutes for lunch and we will proceed until 2:30 in this case.

(Luncheon recess.)

(116) AFTERNNON SESSION 1:20 P.M.

MR. BENNETT: Plaintiff calls Mr. Jensen.

MALCOLM W. JENSEN, called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. BENNETT:

Q Where do you reside?

A Potomac, Maryland.

Q What is your present employment?

A I am president of a manufacturers trade association called the Canada Manufacturers Institute.

Q Prior to that, did you have experience in the area of weights and measures?

A Yes, sir, I do.

Q Would you state what your experience was?

A Yes, sir; I left the faculty of the University of Wisconsin in July 1946 to take over the Weights and Measures Program of the City of Wisconsin and was recruited by the National Bureau of Standards, going there in 1951 to become Assistant Chief of the Office of Weights and Measures, and in 1960, the Chief of the Office of (117) Weights and Measures.

In 1963, I became the Executive Secretary of the National Conference on Weights and Measures.

In 1966, I became, in addition, Manager of Engineering Standards of the National Bureau of Standards and still Chief of the Office of Weights and Measures, and in 1969, was designated Deputy Director of the Institute of Applied Technology which is one of the three units of the National Bureau of Standards, the one responsible for attempting to see to it that science developed in Government is made useful and available to society.

In 1971, I became Director—I am sorry, at the end of 1970, I became Director of IAT and with the Bureau of Domestic Affairs, Department of Commerce in January of 1970.

I became Director of the Bureau of Product Safety in Food and Drug Administration in 1971.

Q Was the Office of Weights and Measures in the National Bureau of Standards under your jurisdiction when

you became Director of the Bureau of Domestic Commerce?

A No, it was not at that time.

Q When you became Director of the Bureau of Product Safety in the Food and Drug Administration?

A No, sir.

(118) Q During the course of your employment in the Office of Weights and Measures in the National Bureau of Standards, did you become familiar with the State and Federal regulations of weights and measures?

A Yes, sir. May I explain that?

Q Yes, please.

A One of the statutory responsibilities of the National Bureau of Standards is to see to it that the laws, regulations and methods of inspection of the states, counties and cities are uniform in order that there may be uninhibited free flow of commerce among the states.

The Office of Weights and Measures works with them through the National Conference on Weights and Measures which it sponsors to develop model laws, model regulations, to develop methods of inspection, to write handbooks and, ultimately, to conduct technical training schools for supervisory and field inspectors.

In order to do this effectively, it is necessary, obviously, that we know what the situation is in the various jurisdictions.

For example, I have had the pleasure of being in every state of the Union and had training in a number of schools in Washington, D.C., so I think it is reasonable to state that I am familiar with what is (119) required in Weights and measures around the United States.

Q In the course of your employment in the Office of Weights and Measures, did you prepare a handbook entitled, "The Manual For Weights and Measures Officials."

A I wrote several manuals for weights and measures officials.

Q I show you a brochure entitled, Handbook 67, National Bureau of Standards, and ask if you were responsible for the preparation of that handbook.

A Yes, sir, I was.

MR. BENNETT: May I have that marked for identification, please.

(Plaintiffs' Exhibit 3 marked for identification.)

Q May I leave this with you for a moment.

Were you responsible also for collecting the information which is the basis of Handbook 67.

A Yes, sir.

Q Did you collect the information which is the basis of the material which appears at page 8 of that handbook under the heading, "Unreasonable Minus or Plus Errors?"

MR. HALPERN: I object at this time.

As I understand, this exhibit is marked for identification only at this point.

(120) THE COURT: Yes.

We had it in the record before, did we not?

MR. BENNETT: Yes.

THE COURT: Again, I ruled before that this is irrelevant, but if you want to make an offer of proof with respect to his testimony for whatever, you can go ahead and make it.

MR. BENNETT: For that purpose, I would like at this time to offer Handbook 67 in evidence.

MR. HALPERN: And we object to this offer.

THE COURT: It is an offer of proof he is making but it is already in the record.

(Plaintiffs' Exhibit 3 for identification received in evidence.)

THE COURT: It is received for the purpose of this offer of proof.

Q Mr. Jensen, I repeat the question:

Directing your attention to the table at page 8 entitled, "Unreasonable Plus or Minus Errors," did you collect the information?

A Some I collected, some I actually developed, sir.

Q But you are responsible for the information that went into that table, is that correct?

A Yes, sir.

(121) Q Would you now state what information was used as the basis for that table?

A The table is based on our best mathematical evaluation of the compatibility of the type of equipment that is used for the weighing and measuring of packages, the compatibility of the individuals responsible for that equipment and also the compatibility of inspectors who have the responsibility of determining the accuracy of their equipment.

Q Was that table based upon any data or information with respect to the hygroscopic nature of packaged food?

A None whatsoever, sir.

Q What, then, was the purpose of the inclusion of that table and the related text on pages 7 and 8 of Handbook 67?

A The purpose is to provide specific guidelines for consideration by inspectors in their check-weighing of packaged commodities.

Q Does it provide any guidance to inspectors with respect to potential gain or loss as a result of moisture content of packaged flour or any other hygroscopic commodity?

MR. HALPERN: Objection. He is leading the witness.

(122) He asked the witness what it pertains to and the witness answered. I submit counsel is testifying in the way he is posing his questions.

THE COURT: A I indicated, it is not relevant to this trial. It is an offer of proof. Whatever it is he is trying to prove, I don't know. It is certainly irrelevant.

Proceed.

Q You may answer.

THE WITNESS: I think I would like to hear the question.

(Question read.)

A No specific guidance, no.

Q In your experience, does any inspection jurisdiction other than the City of New York use this table as a basis for a *prima facie* finding of short weight of packaged commodities?

A Short weight of packaged commodities? Many jurisdictions use the table to determine whether on the basis

of errors in weighing or measuring there exist unreasonable errors under the statute.

Q Do they use it as a basis for determining whether there have been unreasonable variations resulting from changes in the moisture content of packaging?

123 A None that I am aware of.

THE COURT: But you say there are a number of cities that use that to determine what?

THE WITNESS: Considering two types of errors. One relates to the weighing and measuring practice.

THE COURT: That is what they use it for?

THE WITNESS: Yes, ma'am.

THE COURT: That is what New York uses it for?

THE WITNESS: I don't know what New York uses it for.

THE COURT: Let me ask you this: What other cities are you talking about? Is there some way of our knowing this?

THE WITNESS: Each of the fifty states has a weights and measure statute. In the majority of the states, the statute provides that the state will conduct inspection in rural areas in relatively small cities and counties and leaves to the large city and county, the operation generally under state law.

So there are many cities and counties that have weights and measures programs.

THE COURT: And they use that as a guide?

THE WITNESS: Yes, ma'am.

Q Is there material in Handbook 67 which is (124) intended and designed to guide the local weights and

measures inspectors in their determination of whether there have been improper losses of weight as a result of loss of moisture content through dehydration?

A There is language, sir, that attempts to provide some guidance to the inspector about whether a loss in moisture at the time a package is checked does or does not indicate good distribution practice, and this is a key, according to the recommendation of the National Bureau of Standards, that if a package, upon checking at a retail outlet, contains less than the quantity represented, if the contents of the package are hygroscopic and the package is not a moisture barrier, the inspector is guided to an evaluation of the distribution practice of this particular package or lot against what is normal for that particular commodity.

If this is abnormal, then it is suggested that the inspector consider it unacceptable.

If it represents normal practice, then it is suggested that the inspector accept it.

THE COURT: Are you talking about moisture?

THE WITNESS: Moisture alone.

Q Where does that material appear in Handbook 67?

A It starts on page 2.

Q Can you point out exactly where it starts?

A The second paragraph from the bottom. Actually the second full paragraph from the bottom, the language being, "Certain packaged commodities distributed through the normal packer to retain channels"—from there to the end of that page specifically through the paragraph that ends at the top of page 3, and there may be other references. This is specifically to that point.

Q What would you say as to the propriety of the practice of using the table on page 8 for the purpose of determining whether a violation of law has occurred without reference to the material on page 2 and 3 that you just pointed out?

MR. HALPERN: Objection.

THE COURT: What would he say as to the propriety of using that?

MR. BENNETT: This is really the heart of the matter, your Honor. The City is using as the basis for determining whether or not there has been good distribution practice, this table.

They use it arbitrarily, this table on page 8, which is related only to errors in the packing process. It has nothing to do with dehydration according to the testimony that your Honor has just heard, so I would like (126) to hear out of his experience, I would like to hear his comment on what he considers to be the propriety of that practice.

MR. HALPERN: I submit to your Honor that counsel has just testified that the witness has testified to no such thing in the past, your Honor, and no such thing on his testimony so far on the stand, and I would submit that the City does not use this table as an arbitrary measure and does not concern itself with good distribution practice.

The reality is just to the contrary. We use this table as *prima facie* evidence and it has been our position as we stated a number of times that after we use this table as *prima facie* evidence, we then address ourselves to good distribution and good shelf practice on the part of the retailer.

The City does not use this table in an arbitrary fashion, and I submit that counsel for the plaintiffs is trying to distort the facts and distort our position here.

MR. BENNETT: I think what I stated is what they state in their own pleadings, what they claim—

THE COURT: He has just stated his position on the record.

What do you say about that? You want this witness to answer as to the propriety of using it as an arbitrary (127) measure?

The City says we don't use it as an arbitrary measure but you then say they do use it and where are we going to get with that kind of argument, I don't know.

MR. HALPERN: I would further submit, your Honor has ruled that we don't use it as an arbitrary measure in her decision.

MR. BENNETT: May I amend my question to refer to it as being used as *prima facie* evidence?

THE COURT: Yes, use it as that.

Q What is your comment on that?

A I would say the use of the table on page 8 in any regard for a determination of the acceptability of moisture loss would be inappropriate. It would be technically incorrect.

Q Is there a guide, local weights and measures inspectors can use to determine what the original weight of a package of flour weighed when packed?

A The method that has been recommended throughout our training activities, if a question arises with respect to a particular lot of delivery or sample, that package or those packages—I will talk in the singular for simplicity—that package can be check-weighed very carefully.

A moisture determination at the time of weighing can be determined. The code on the package can be recorded and either through the weights and measure officials in the jurisdiction where the flour was packaged or directly to the packer of the flour, information can be obtained as to the moisture content of the package when it was packaged.

In simple arithmetics progression, one can determine what the package weighed when it was packed.

Q Do you know if that method is used in some jurisdiction by local weights and measures inspectors?

A It is used, yes.

Q Mr. Jensen, what is the practice and policy of the Federal Government in the enforcement of the Federal laws and regulations with respect to overpacking of flour?

MR. HALPERN: Objection as to the policy. He is not a Federal representative at this stage.

MR. BENNETT: He has had years of experience in the top administrative office of these regulations and I would simply like to ask him their construction and application of the Federal law is with respect to overpacking.

MR. HALPERN: I would submit that is completely irrelevant. The law speaks for itself and the regulation speaks for itself.

(129) THE COURT: Let me hear the question.

(Question read.)

MR. BENNETT: If there is an ambiguity in the Federal law, and there certainly seems to be a difference of opinion here—

THE COURT: Are you asking him what the law is or what the practice is, because we don't call any witness ever to tell us what the law is.

MR. BENNETT: I am asking him what the administrative practice is, your Honor, under the law.

THE COURT: All right, he can tell us.

A Enforcement of the accuracy of quantity declarations on a package lies in the Food and Drug Administration.

The policy of the Food and Drug Administration is simply at the time packages are first handed by the packer to a person, firm or corporation over which it has no control, the package shall, on the average, contain the quantity declared.

The package with respect to overpacking of any commodity, the policy with respect to overpacking of any commodity is very simple and it is based on the theory that a consumer in making a consumer choice is interested in three pieces of information about a package. The price, the quantity and the quality or taste sort of. If packers are allowed or required to (130) overpack so that the declared weight has no precise meaning, then that one aspect of consumer's choice becomes ambiguous.

So long as a product is clearly defined and at the time the package is delivered to a second party, be it a wholesaler or common carrier or retailer, it contains on the average the quantity declared.

Then the term, weight or measure has integrity. That is the policy of the Federal Government.

MR. BENNETT: No further questions.

CROSS-EXAMINATION

BY MR. HALPERN:

Q Mr. Jensen, did I tell you correctly to say that the unreasonable minus and plus errors in the chart which appears on page 8 is addressed solely to the packaging of flour at the mills?

A The numbers developed for inclusion in the table on page 8 were developed for the purpose of guiding the inspector in determining the acceptability of any errors in the packaging process.

Q There is also a footnote on the top of the table which states, and I quote, "It will be noted that the suggested plus allowances are twice the suggested minus allowances at each label quantity. This is an (131) acknowledgement that packers must be allowed to overfill such packages as are susceptible of moisture loss."

Can you tell me what is the purpose of that statement?

A The purpose of that statement is to permit their being maintained by the packer for a reasonable time, hygroscopic packages that he has packaged and labeled.

The inspector has the responsibility of accepting as reasonable, or refusing to accept as unreasonable, packages that go beyond these values.

Maybe I could clarify that with a specific example:

In modern supermarkets, much of the meat is packaged right at the market. It may be packaged on Monday morning and put out for display at that time and it may not be sold for two to three days.

If the inspector should be there to check the package after it is immediately packaged and labeled, he will find that there is a reasonable overpack because that package never leaves the packers hands until the consumer buys it.

If, on the other hand, he should check it on Wednesday and such meat is hygroscopic, as you know, it could be well down to the declared weight. The inspector (132) has the responsibility of checking it before it leaves the packer's hands, since it can be determined in time what time he will make that inspection. There is a double figure or double quantity given before a package is determined to be unreasonably in error.

THE COURT: A double minus figure be given?

THE WITNESS: Double plus figure.

THE COURT: I didn't follow that.

THE WITNESS: The permitted error under registration, the permitted error in quantity in the package above the declared amount is double the permitted error below the declared amount before the error is deemed to be unreasonably large.

Q Mr. Jensen, are you telling us, then, that the Federal Food and Drug Inspectors are concerned with short weights at the milling and packaging level?

A The Federal Inspectors are concerned with short weight at the time a package is introduced into Interstate Commerce.

Q Do the Federal Inspectors also concern themselves with the packages on the shelves in supermarkets and grocery stores in individual localities?

A The Federal Inspectors seldom will concern themselves with a package that is packed on the premises (133) and sold on the premises.

If, however, law is found to be violated by the federal inspector, their jurisdiction would go to the retail shelf.

Q Would you recollect then that we have a void between the time the package leaves the mill until the package reached the ultimate consumer who is going to use that package insofar as inspecting for net weight?

A I think, sir, there is no void whatsoever, because the state weight and measure laws in every case so far as I know prescribe that at any exchange of merchandise for other value, the quantity must be properly represented.

Q So you then recollected that the municipal authority and specifically the City of New York would have an interest in the package as it is found on the shelf ready for sale, is that correct?

A I think any weights and measure inspector has any interest in any quantity that represents weighing and measuring.

Q Could you tell us what the federal standard is in regard to a weight or measure that would be considered a short weight or a minus factor?

A The regulation issued pursuant to the (134) Food & Drug Act and regulations issued pursuant to the Fair Packaging and Labeling Act, both federal laws now in effect, require that on the average, the packages of any lot, shipment or delivery shall contain at least the declared quantity.

Q How about on the grocery shelf, is there any provision for that?

A The federal law does not address itself to the grocer's shelf. The federal law addresses itself to interstate commerce.

Q Does the federal law use the term reasonable variation?

THE WITNESS: I thought I should not answer about law, your Honor.

Q I am just asking if you know of your own knowledge whether that is the phrase used.

MR. GRAHAM: If he is going to be asked questions about the federal law and the specifics and the language, perhaps Mr. Halpern can show him the statute or the regulation to which he has referred to.

THE COURT: Yes, I think so, but I don't think this witness should be asked to construe a statute.

MR. HALPERN: I am not asking for the construction. I am asking whether he knows of his own (135) knowledge. He purports to be an expert. I am not asking him to construe the language.

THE COURT: Do you know the answer?

THE WITNESS: I would prefer not to attempt to quote from statute without any satute before me.

Q If I submit to you that the measure of the standard that is set forth, or the language that is set forth in both the federal Fair Packaging and Labeling Act and the federal Food, Drug and Cosmetic Act is "reasonable variations" would agree with me on that?

A If you would put that before me and from the statute or from the Code of federal Regulations, obviously I would agree.

Q You don't know that of your own knowledge?

A I would not attempt to quote directly from federal law or federal regulations without having documents before me.

Q Would you answer the question—

THE COURT: He is not asking you now what the statute says. He is asking you do you know of your own knowledge that is a federal standard.

A I would answer to the best of my recollection, this is approximately what the federal regulation prescribes.

(136) Q A reasonable variation.

A Shall be permitted.

Q How would you interpret specifically what a reasonable variation would be if you were to advise inspectors to go out and determine whether variation was reasonable or not?

A Remembering that the federal statute does not address itself in any way to loss of moisture, because it is at the first exchange, the first delivery from the packer. My recommendation was that the numbers contained on page 8 of Handbook 67 be applied to determine whether the error is found on the package relates only to the packaging process are within the term "reasonable."

Q Mr. Jensen, we have a normal inspector that goes out to inspect a package. Its federal guideline is a reasonable variation. Is there any more specificity that he could use to address himself as to whether any one package is underweight?

A Any single package is underweight-

Q Yes.

A I regret that I am not informed on the New ordinance.

Q I am addressing myself to the federal law.

(137) A Would you please restate your question.

THE COURT: Let the reporter read it.

(Record read)

MR. GRAHAM: Your Honor, I can understand the witness' concern about the question. If Mr. Halpern is asking him for a hypothetical with respect to what an inspector would do in an inspection situation, I think perhaps he ought to fill in the details of the inspection situation. We don't know under what conditions the package is being inspected, we don't know the size of the package, we don't know the conditions under which it is stored. Indeed, we don't even know the condition of the outside of the package.

THE COURT: I thought the question was addressed to the general practice of federal inspectors to which this witness has already testified. Wasn't he asked about the practice?

MR. GRAHAM: I didn't understand that to be the question he was asked.

THE COURT: Let's limit it to that.

He has testified pursuant to direct examination as to what the federal practice is. Is this related to the federal practice generally?

MR. HALPERN: Yes, your Honor.

138 A I think it would be highly improbable that in any case a federal food and drug inspector would check the quantity of a single package because his concern is with lots, shipments or deliveries. His aim is to see to it that packages entered into interstate commerce do on the average contain the quantity declared and that there be no unreasonable errors. In all my experience I have never encountered one federal inspector who picked up one single package and examined it for accuracy of quantity.

Q Mr. Jensen, you are now addressing yourself to the practice when you were in government service, is that correct?

A Yes, I am addressing myself to the time when I was in government service.

Q And not the current practice?

A I have no way of knowing whether there has been any change but I am in communication—let me rephrase that answer.

I am still used on a consulting basis without charge by the Office of Weights and Measures, the National Bureau of Standards, the Food and Drug Administration, by the Environmental Protection Agency and by the Occupational Safety and Health Administration.

(139) I think it reasonable to assume that I am aware of current practice.

Q Mr. Jensen, if a New York City inspector inspects packages of flour on a shelf in a supermarket and finds that these packages—this is a five pound package, would weigh less than five pounds, would you as an expert offer an opinion as to how much under five pounds that package should weigh before it would be considered short-weighted?

A I don't think that question can be answered. There are two types of errors involved.

If one had made a determination of the moisture content in the package and related this to the moisture content at the time packed so that that could be set aside, then I think it reasonable to recommend that in a lot shipment or delivery where an average is being determined, any that go beyond the numbers suggested

on page 8 in Handbook 67 would have to be considered unreasonably large areas.

MR. HALPERN: No further questions.

REDIRECT EXAMINATION

BY MR. BENNETT:

Q You say they would have to be considered unreasonably large errors. Is this on the hypothesis (140) that the testimony to determine the original weight indicates that they were originally, on the average, at stated net weight?

A Yes, sir. I would need the assumption that if by relating back to the original moisture content it had been determined what the labeled weight was at time of packing, determine what the net quantity was at the time of packing and compared the net quantity with the labeled weight and any in the lot fell beyond, then I think the error in packaging, if it fell beyond this was too large.

Q You are speaking then of errors which after that determination are obviously the result of the packing operation, is that correct?

A Yes, sir.

I think I should add one additional qualification. One does encounter damaged packers and leakers that are treated on their own individual basis.

RECROSS EXAMINATION

BY MR. HALPERN:

Q Do I understand you to be telling this Court that if a package on a retailer's shelf, a five pound package is found to be 6 ounces underweight, you would have to

address yourself to the packing operation at the (141) mill and not concern yourself with any intervening factors to determine whether there has been a short weight of that package?

A That is absolutely correct.

MR. HALPERN: No further questions.

THE COURT: Do you have any federal regulations or law or practice which applies to the flour package you see there?

THE WITNESS: Yes, ma'am.

THE COURT: What federal law would reach that on the grocer's shelf here in New York?

THE WITNESS: Both the Food, Drug and Cosmetic Act and the Fair Package and Labeling Act.

THE COURT: As to weight?

THE WITNESS: Require that the quantity declared on the outside is met by the quantity on the inside.

THE COURT: And that is the Food and Cosmetic Act?

THE WITNESS: And the Fair Package Labeling Act.

THE COURT: Do federal inspectors come around to grocery stores in New York pursuant to that to determine whether that package that you see there, for (142) example, has the correct weight?

THE WITNESS: No, your Honor. The practice of the federal inspectors would be at the mill when the package is handed to the common carrier.

THE COURT: That is what I was getting at. I was getting at whether there is any federal law or regulation which reaches that package on the shelf in a grocery store in New York.

THE WITNESS: I think that is a very precise point of law and I think you will find case law that will tell you that where the Food, Drug and Cosmetic Act has been violated at the packer level, the Food and Drug Administration has the authority to go to the retail shop and take the package off, to seize the packages there.

THE COURT: You say you know of case law?

THE WITNESS: Yes. My memory is a bit fuzzy but I believe the Castoria case even took the inspectors into the home. I am not a lawyer, though.

THE COURT: Let me ask you this.

Do you know of federal inspectors that go around doing what these New York City inspectors purport to do under the New York City ordinance here?

THE WITNESS: Not in the retail stores, your (143) Honor, no.

If I may add, if the packages contain the declared quantity when it leaves the mill and if they are not mishandled, the only thing that can be lost between there and the consumer's shelf is moisture. There is just nothing else that can happen to the package. The basis philosophy is, if you find--this is our recommendation to the inspectors.

If you encounter difficulty at a retail shelf, go back to the state or city or county inspector where the package was packed and find out what was transpired there. Go to the Food and Drug Administration. Find out whether that lot as coded has been examined. No one has found a way yet to prohibit the migration of moisture in hygroscopic products.

THE COURT: The only weight loss you say then which can occur to any package once it leaves the mill is a moisture loss?

THE WITNESS: Water, unless, of course the package has been mishandled.

THE COURT: All right. If there are no more questions, the witness may come down.

(Witness excused)

THE COURT: I want to ask plaintiffs' counsel, (144) do you agree with the witness that there is no federal law which purports to do what this New York City ordinance would do, go to grocers' shelves to determine the weight of that package on the grocer's shelf in a grocery store in New York City?

MR. BENNETT. If I understood the witness and as I understand the law, the federal inspector has the right to follow it up—

THE COURT: I didn't ask you that. He gave some vague statement about he had a vague recollection of some case law and I am asking you, do you know of any federal law which results in a federal inspector going into a grocery store in Queens and picking up a pack of flour to weigh it?

MR. BENNETT: I think there is federal law that gives him the right to do it in connection with the enforcement—

THE COURT: What federal law?

MR. BENNETT: I believe there are decisions that we have cited somewhere in our brief that indicate that the interstate commerce continues right down to the consumer, which would seem to me to give federal authorities jurisdiction.

THE COURT: The point we are getting at, as (145) I pointed out in the opinion, one of the things you have to show is that the New York City law was more stringent; do you remember that?

MR. BENNETT: Yes, I do.

THE COURT: That is what we are getting at. If there is no federal law which operates in the same way, how can you demonstrate that this New York City law is more stringent than the federal law and therefore a burden on interstate commerce?

MR. BENNETT: We have briefed this. There are the federal regulations adopted pursuant to the federal law which provide that loss of weight, ordinary and customary loss of weight, I think is the phrase, which occurs when exposed to conditions which normally occur in good distribution practice, shall be allowed. The federal law says it shall be allowed.

THE COURT: What shall be allowed?

MR. BENNETT: Loss of weight which normally occurs in the course of good distribution practice.

New York City will not allow it. That is where the conflict comes and that is why the New York City law as construed and applied is a lot more stringent than the federal law. The federal law will permit this loss of moisture. There are express provisions in the (146) federal regulations adopted pursuant to the federal statutes that says that his loss of moisture in these circumstances will be permitted.

THE COURT: And its position that New York City wouldn't permit it.

MR. BENNETT: That is right.

THE COURT: Do you have any other witnesses?

MR. BENNETT: Yes.

A. VAUGHN HAVENS, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BENNETT:

Q Mr. Havens, where do you reside?

A Piscataway, New Jersey.

Q What is your employment?

A I am Professor or Meteorology at Rutgers University in New Brunswick, New Jersey.

Q What is your background and experience in meteorology?

A I earned the Bachelor of Science degree at New York University in 1944. The Master of Sciences degree in Rutgers University in 1948. I have been a (147) professor of meteorology at Rutgers since 1948 except for two years when I was called back to active duty with the New York Air Force Weather Service during 1951 to '53.

Q Professor Havens, did I ask you to prepare for me a study of relative humidity levels at Central Park, New York City over a period of years?

A That is correct.

Q Did you make that study?

A Yes, I did.

Q Did I also ask you to then convert those outdoor relative humidities into the equivalent interior relative humidities at the same time at a hypothetical indoor temperature of 70 degrees?

A Yes, that is correct.

Q Did you do that on a month-by-month and annual basis?

A Yes, sir.

Q What period of years was covered in your study?

A In the humidity data at Central Park, it covers the period 1920 through the present time but I only had the data through 1972 available to me. That is a 53 year record of relative humidity at Central Park.

(148) Q Was this done on a day-by-day basis or an average basis or what basis with the monthly relative humidity figures arrived at?

A Relative humidity is recorded at four different times of the day at Central Park. 1:00 A.M., 7:00 A.M., 1:00 P.M. and 7:00 P.M. The 35 year record that I used gives monthly and annual averages for each of those hours.

Q Would you explain what relative humidity is, with emphasis on the "relative"?

A Relative humidity is the ratio of the actual water vapor present in the atmosphere to the maximum that can be present without condensation occurring at any given temperature.

Q What then is the effect of heating a specific volume of air with a given level of moisture? How does that effect the relative humidity figure?

A If a given volume of air is heating, the amount of water that is required to produce saturation is increased sharply. This results in a drastic reduction in relative humidity simply as a result of the change of temperature without any change in the actual moisture content of the air.

Q Did you also at my request prepare a chart (149) based on the mean annual relative humidity in Central Park over that same period of years?

A Yes, I did.

Q What did that chart show?

A What I did was take the mean annual relative humidity and assume that that same humidity—that same air was brought indoors to a temperature of 70 degrees Fahrenheit. In the wintertime, of course, this results in a drastic reduction in relative humidity. In the summertime, it actually results in an increase in relative humidity, in interior relative humidity compared with the average outdoor relative humidity.

Q Mr. Havens, do you have copies of the chart prepared on the basis of figures prepared at 7:00 P.M.?

A Yes.

MR. BENNETT: I would like to hand these up. It would be easier for your Honor to follow them.

Would you mark these three for identification.

MR. HALPERN: I assume these are being marked for identification at this point.

MR. BENNETT: They are.

(Plaintiffs' Exhibits 4-A, B, and C, were marked for identification)

Q Professor Havens, would you refer to those (150) documents which are marked 4-A, B and C. If you look at the chart which is marked 4-A and explain to the Court what that shows in terms of actual humidity and hypothetical relative humidity at indoor 70 degrees.

A This chart is entitled mean monthly relative humidity at 7:00 P.M., compared to equivalent indoor relative humidity at 70 degrees Fahrenheit. The line which connects the circles for each month shows the mean relative humidity at 7:00 P.M. varying from a high of 67 percent in September to a low of 57 percent in April.

The line connecting the x's shows the indoor relative humidity, assuming the air is brought in and heated to 70 degrees Fahrenheit during the cooler months and cooled to 70 degrees Fahrenheit during the summer months and here we see that the relative humidities during July and August are actually increased to 79 percent whereas during the colder months, the relative humidity drops very sharply so in October, the equivalent indoor humidity is 42 percent. By November it becomes 28 percent. December 10 percent, January and February 15 percent. The low for the winter, then the values again begin to increase back up to 79 percent by July.

(151) Q Those figures you said are based on monthly mean relative humidities at that time?

A That is correct.

Q If there were for a period of several days a much lower outside temperature, now would that effect the figures?

A If you had a cold wave with not only very low temperatures but extremely dry air moving in from Canada which happens frequently in the winter season, that air brought indoors and heated to 70 degrees Fahrenheit would give you even low humidities than 15 percent, frequently indoor humidities as low as 5 to 10 percent.

Q Would you give us the same explanation with respect to the significance of the chart which is marked 4-B?

A The data on 4-B are the same as 4-A except the 1:00 P.M. relative humidity was used. The only significant difference is, the 1:00 P.M. values are slightly higher during the summer months with a maximum of 90 percent in July. Also slightly higher in the winter with a minimum of only 19 percent in February compared with 15 percent at 7:00 P.M.

Q Would you look at the chart that is marked 4-C and explain the significance of that?

A Chart 4-C was prepared to show how the relative humidity varies with temperature and for this purpose, we selected the mean annual relative humidity of 50 percent and then computed the equivalent indoor relative humidity at 70 degrees Fahrenheit and we see if the indoor temperatures—I am sorry, if the outside air temperature is 80 degrees Fahrenheit and we cool that off to 70 degrees indoors, the relative humidity of 56 percent actually increases to 79 percent.

On the other hand, if we take outside air temperatures substantially below 70 degrees, then the mean relative humidity of 56 percent decreases very rapidly.

For example, if an outside air temperature of 60 degrees, we have a relative humidity of only 40 percent. At 40 degrees, only 19 percent. At 20 degrees, the equivalent indoor relative humidity at 70 degrees would be 7 percent and finally, at an outside air temperature of 10 degrees Fahrenheit, the equivalent indoor relative humidity of 70 degrees would be only 4 percent.

MR. BENNET: Thank you, you may cross-examine.

MR. HALPERN: Since there is nothing in evidence, I don't know what I have to cross-examine.

(153) MR. BENNETT: I offer the charts in evidence.

MR. HALPERN: Objection as having no relevance whatsoever as to cause of action on trial here in the first instance.

In the second instance, I would like to have a voir dire on the charts as such.

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. HALPERN:

Q Professor, you have testified doing studies in the Borough of Manhattan and Central Park, City of New York as to outside temperature, is that correct?

A Yes.

Q You haven't done any studies in any other locale in the City of New York, have you, outside temperatures?

A I have worked with the observations at John F. Kennedy Airport and LaGuardia Airport on previous occasions.

Q I am talking about the charts that you now have.

A For this purpose I felt that Central Park was more representative of conditions in the city than the airport readings.

Q You also testified, I believe, that you took an arbitrary figure of 70 degrees as a mean indoor temperature figure, is that correct?

A Yes.

Q Is this for the complete year?

A Yes, I used that for all months.

Q We are talking about humidity figures, correct?

A I think you said temperature.

Q Your charts show temperature or humidity or both?

A Well, the charts show humidity. Equivalent indoor relative humidity at a temperature of 70 degrees Fahrenheit.

Q Would air conditioning have an effect upon the humidity indoors?

A I think that would depend on the type of air conditioning.

Q Aren't there air conditioning units that draw humidity out of the air?

A Yes. There are also air conditioning units that put humidity into the air.

Q Did you consider this factor into your charts?

A No, it was not possible to do so.

(155) THE COURT: What is the purpose of the offer?

MR BENNETT: This evidence, your Honor, ties into all the other evidence that we have offered, particularly the tables in the Anker, Geddes & Bailey report which shows that an indoor relative humidity of 10 degrees, an overpack of 8.8 percent would be required to assure—

THE COURT: Do we have that on these charts?

MR. BENNETT: It is in the table in the Anker, Geddes & Bailey report.

THE COURT: What do these charts show?

MR. BENNETT: They show that indoor temperature in New York City in the wintertime does get down—relative humidity gets down to 10 percent in the wintertime, which ties it into the Anker, Geddes & Bailey study. We thought it would be necessary to tie this together by showing actual relative humidity conditions in New York City.

MR. HALPERN: I would submit to your Honor that we are not showing actual relative humidity because there has been no testimony offered as to the actual relative humidity in any store in which these packages were taken from and found to be short weight. These are merely speculative charts that have no relevance.

(156) MR. GRAHAM: I think the objection goes to the weight to be given to the charts. The fact of the charts is clear. Mr. Halpern can quarrel as to any given store but I don't know how it would be possible for us to recreate the relative humidity conditions in a given store. The problem is bigger than a given store. We are talking about the City of New York and the charts endeavor to show what happens to outside temperature and relative humidity conditions when you bring that air inside into a supermarket in the wintertime and it is offered for that purpose.

If Mr. Halpern wants to quibble with the offer, that goes to his cross-examination on the merits of the charts and the weight to be given to the charts, but certainly not to the fact of the charts.

THE COURT: Yes, I would agree. They are admissible, I gather for whatever they show. I gather this is to show that the loss of weight in these packages was due to humidity?

MR. BENNETT: Low relative humidity in the stores in the wintertime.

MISS MODRY: May I make another objection. These charts go up to 1972. The violations are all beginning in 1973. I don't know whether the winter of '73 (157) was cooler or the summer hotter than in any other given period and they only cover one out of five boroughs which is the jurisdiction in New York City, so I don't know that they show anything at all with respect to what New York City is doing on the flour.

MR. GRAHAM: These charts are compiled from data over 53 years. Unless the City is contending that all of a sudden in '73 and '74 weather conditions changed radically in New York City—

THE COURT: Today it did.

MR. GRAHAM: I agree.

THE COURT: And no air conditioning in this court-room.

MR. GRAHAM: We did the best we could with respect to the figures available.

THE COURT: They will be admitted for whatever purpose.

MISS MODRY: It could be that while there is moisture loss in one place and not another, that that particular place is overheated and doesn't have to be, or it is stored for a long period of time. This doesn't make relevant the question of whether we are unreasonably imposing a burden on interstate commerce by our guidelines of 3/8. That is obvious.

(158) (Plaintiffs' Exhibits 4-A, B, and C were received into evidence)

THE COURT: If there is nothing further from the witness, he may come down.

(Witness excused)

THE COURT: As I indicated earlier, we are going to have to recess until tomorrow morning.

MR. HALPERN: Does this represent their complete case because I could make my motions at this time?

THE COURT: I will have to hear those in the morning.

Do you have another witness?

MR. BENNETT: No we do not.

THE COURT: We will recess until 10:00 o'clock tomorrow morning. We will hear your motions at that time.

Will you have any witness in the event your motion is denied?

MR. HALPERN: Yes, your Honor.

THE COURT: One of the problems at least that I am having with that is, what kind of opportunity the City affords a retailer charged with a violation to show that he is using good distribution practices and (159) it isn't clear to me what the City considers good distribution practices and I don't know whether the City is saying that a practice which results solely in the loss of moisture is bad and I think I asked you this when we began, or at least yesterday, again what the City's interest is here specifically. Is it to protect against loss of moisture or what is the City concerned with here, really when it seeks to protect the consumer? That is not particularly clear.

MR. HALPERN: We will address ourselves to that on our affirmative case, your Honor, or our defense.

THE COURT: In short, what is the City's contention, at least with respect to this moisture problem? Are you trying to prevent a loss of moisture or are you trying to insure the consumer the amount shown on the package?

MR. HALPERN: We would submit your Honor, that the amount shown on the package includes a moisture percentage of anywhere from 12 to 15 percent. This moisture is included in the five pound weight and when a housewife buys a bag of flour for five pounds, she has a right to expect five pounds including the moisture as part of those five pounds, and if the actual weight of the package be it dried flour or be it moisture is (160) under five pounds and substantially under within the guidelines, then we submit that there is a *prima facie* evidence of short weight of that package of flour.

THE COURT: So the City is concerned that the package not be shortweighted, is that it?

MR. HALPERN: Yes, be it short weight in flour or short weight in moisture beyond the acceptable guidelines.

THE COURT: Even if the short weight results wholly from the loss of moisture, the City is still concerned?

MR. HALPERN: We are concerned to the extent that we say to the retailer, if the loss due to moisture was unavoidable, we will absolve you from liability, but if you abuse this package in any way when you received it from the mill, if you stored it in some overheated place or if you didn't engage in good distribution practice or abuse these packages in some way, so that when the housewife receives and purchases this package it is substantially underweight, whether due to loss of moisture or loss of the dried flour content, that there is a short weight.

THE COURT: And he does have an opportunity in the state court to show that when he is brought in (161) for violation?

MR. HALPERN: He has that opportunity when he is brought before an administrative officer of the Department of Consumer Affairs in the first instance to explain the short weight. As we have said, the *prima facie* case is less than 3/8 of one ounce. This is not absolute. This is *prima facie*. We call the retailer in to explain. We are in no position to inspect his warehouse. We are in no position to go back to the factory to see how it is packed. That is the federal jurisdiction. We are concerned with the package on the shelf and it seems to me that the mills here are just gingerly avoiding the responsibility by saying we pack it at the factory. It is packed at the proper weight and moisture therefore

we are absolved, the retailer is absolved, everybody should be absolved but the housewife is short-weighted and when the receipt calls—the short weight can be as much as 2 ounces or over 2 ounces which is a quarter cup. This can have an effect on the recipes that the housewife uses.

THE COURT: 10:00 o'clock tomorrow morning, gentlemen.

(Adjourned to May 1, 1974 at 10:00 o'clock)

(162) (Trial resumed)

THE COURT: Is Mr. Bennett here?

MR. GRAHAM: No, your Honor. He asked me to express his apologies. He did not realize the case would go for three days. He asked me to finish up for him if your Honor has no objection. He was otherwise committed today. He did not want to delay the proceedings. He wanted to bring them to a conclusion as rapidly as possible.

THE COURT: All right.

MR. GRAHAM: Your Honor, I only have one more matter and it is in the nature of housekeeping. We served requests for admissions on the City. The City responded to the request for admissions. I want to make sure insofar as my affirmative case is concerned that any admissions contained in their answers are part of the record and part of my case.

THE COURT: You can offer them now and they will be marked as an exhibit.

(163) (Plaintiffs' Exhibits 5 and 6 received in evidence.)

MR. GRAHAM: That is all we have, your Honor.

MR. HALPERN: At the close of the plaintiffs' case, the defendant moves for a dismissal of the complaint in connection with the tryable issue.

In your Honor's order, you indicated that the trial on the plaintiffs' motion for a permanent injunction will be limited to the issue of whether Section 833-16.0 of the Administrative Code of the City of New York as applied to the plaintiffs unnecessarily burdens interstate commerce.

This burden was on the plaintiffs in this case. The plaintiffs offered the testimony of four witnesses to prove their case. The testimony of three of the four witnesses in the order of their appearance, Mr. Arlin Ward, Mr. William Johnson and Mr. Malcolm W. Jensen was rejected by the Court. I would submit that the testimony they proffered was not admitted in evidence and the proffer that they made was merely an offer of proof which has no bearing whatsoever on the determination of the issues here.

I would say that in connection, they offered no testimony whatsoever to establish their *prima facie* or their affirmative case on the issue of an undue burden on interstate commerce as applied to them.

(164) The fourth witness was one Vaughn Havens who was a meteorologist who offered some testimony that was admitted in evidence. His testimony was limited solely to charts and testimony on the mean temperature in Central Park in the City of New York as interpolated in a supermarket at certain mean temperatures.

I would submit this is the sum total of the testimony offered by the plaintiffs in this case and under these circumstances, the plaintiffs without any shadow of a doubt

have not approached, let alone met their burden in this case.

With the Court's permission, I submit this is sufficient in and of itself to warrant a dismissal of the trial.

I would also like to comment if I may and if the Court feels necessary on the offer of proof even though it is not the testimony in this case.

THE COURT: Yes, I think it is necessary.

MR. HALPERN: As outlined by your Honor in your opinion, the plaintiffs were required to prove on the trial of this action firstly, and this of course is a threshold question, that in connection with the bags of flour that were at issue in this case, that the plaintiffs were engaged in interstate commerce.

(165) We have three plaintiffs here, first being Pillsbury Mills. I submit there was no testimony offered or proffered on behalf of Pillsbury Mills to indicate they are engaged in interstate commerce.

Second. The second plaintiff is Seaboard Allied Milling Corporation and I suggest they likewise offered nor proffered any testimony to indicate they were engaged in interstate commerce in the State of New York.

The third plaintiff, General Mills, Inc. made an attempt to offer some testimony by Mr. Johnson who is their plant manager and was not concerned as he testified himself with distribution, but in supervising the plan.

He testified that he believed that they shipped some flour to a New Jersey distributor who in turn reshipped it back to New York from the Buffalo plant.

I would submit that none of the plaintiffs under these circumstances have met the threshold burden that they are engaged in interstate commerce.

What is their burden in connection with the commerce clause? I submit that they had to establish that the city ordinance as applied to them as an undue burden in interstate commerce and the criteria for that, as set forth in your Honor's opinion on the motion for summary judgment and is the case law on the subject, that (166) the plaintiffs must prove in the first instance that the ordinance as enforced against them imposes standards substantially more stringent than those of the applicable federal laws.

Your Honor has decided in this case that the federal laws, that is the Federal Fair Packaging and Labeling Act and the Federal Food Drug and Cosmetic Act both provide for reasonable variations in the weight of flour.

Your Honor has further ruled that the city ordinance makes the same provision, for reasonable variations. The only distinguishing factor between the city ordinance applied and the federal ordinances, is that the city ordinance sets a *prima facie* standard of 3/8 of one ounce.

The federal ordinances I submit to your Honor speak only of unreasonable variations.

I understand this is not the subject of inquiry here, but it is a very vague standard in and of itself, the term "unreasonable" whereas the city ordinance establishes a *prima facie* test and it is merely that and nothing more, so I would submit that the city ordinance is not more stringent than the state ordinance or the federal ordinance in this case.

(167) As also was indicated by the offer of proof, and I believe it was Mr. Jensen who indicated that the areas of concern were different; that the federal inspectors were concerned with the flour as packaged at the plant, whereas the city inspectors were concerned with flour as it appeared on the shelves in groceries and supermarkets and

was being offered for sale, and I find this, if I may just depart, to be a very interesting division because the federal statute also mandates that the concern of the Federal Government should be at the retail level, yet the Federal Government seems to concern itself with the manufacturing level only.

Therefore, I would submit in this area there are two separate areas of concern and neither one conflicts or is more stringent than the other.

There has been no testimony offered or proffered by the plaintiffs that the municipal requirements exceed the limits necessary to vindicate legitimate local interest.

The plaintiffs have proffered testimony as to moisture loss. They have offered no testimony to indicate that the moisture loss does or does not have an effect upon the flour. I submit that this was their burden in the first instance. They did not meet it by any offered or proffered testimony whatsoever.

(168) I submit there was no testimony offered or proffered with respect to another criteria in determining undue burden in interstate commerce, namely that the ordinance unreasonably favors local products. They offered no evidence whatsoever of local producers let alone a favoritism shown towards the local producers.

In fact, I would submit to your Honor that the very plaintiffs here with their plants in Buffalo, are the local New York producers.

A further criteria they had to meet in which they offered or proffered no testimony was that the city ordinance as applied to them, constitutes an illegitimate attempt to control the conduct of packers beyond the borders of New York.

I submit to your Honor that they offered no or proffered no testimony to indicate that we are seeking to control

their operation or product beyond the limits of New York State. We do not send inspectors to their plants outside of New York State.

We don't even send inspectors to their Buffalo plants, and we don't tell them how to process their wheat in milling. We don't tell them to add water, we don't tell them to dehydrate the product. We don't tell them what type of a package to put the product in, whether (169) it is porous or not. We don't tell them, you are having an escape of power in your product or an escape of moisture. We make no pretext.

We don't have the expertise and we readily admit it, to manage or tell them how to manage their plants. We merely say to them that when the package comes to New York and reposes on shelves in New York City and when a housewife walks into the supermarket and sees the label which says 5 pounds, she should be getting 5 pounds, whether the composition is powder, moisture, or a combination of the two, and we submit for the plaintiffs to cavalierly describe their process here as telling us that the wheat comes into their plant with a moisture content, that they add an additional moisture content in the processing, that they put it in paper bags and that if the product leaves their plant at 5 pounds or a little over, but to also disregard the fact that they themselves claim there is a moisture loss, that there are other losses and to cavalierly say we are not concerned with those losses as long as it leaves our plant at 5 pounds and meets the federal specifications, we are absolved and the retailer is absolved, and I submit in this regard, we are not proceeding against the manufacturers of the flour.

We are proceeding on the retail level and we say on the retail level that even if we find the package short weight, that is only *prima facie* evidence of a short weight.

We are not arbitrary. We say to the retailer, come into our hearing. Explain that you are engaging in good distribution practice. Explain that you haven't stored the flour in a warehouse where there has been a depletion in the moisture content or the dry powder content.

Explain how you handled the product in the cases, whether you just throw them around cavalierly and have powder filled or whether you give them special handling and recognition because the packages may be fragile and there may be powder loss as well as moisture loss.

Explain the conditions in your individual stores and explain to us that the loss is unavoidable, and if they do this, and we submit that under those circumstances we would find there is no violation.

I don't think we could be more reasonable than that but what do the plaintiffs say here? They say City of New York with your inspectors, you should have the expertise when you see a short weight flour or test flour and find the short weight, you should have the expertise first to discern our code which is a secret code. By (171) looking at a code number, and I would submit to you that Mr. Johnson, their own plant manager, had difficulty in locating a code number on one of their own packages.

They say to us, Mr. Inspector, you discern the code number. You interpret the code number. You then have to ascertain what plant it came from, the date it was milled, the date it was processed. They would place the entire burden upon us. They say when they have to send it to a laboratory to check the content. We have to ascertain whether there is a moisture loss or powder loss.

I submit if we had that burden, we would have no weight control or no true weight control in the City of

New York, not only for flour, but for other products that are equally or in certain varying degrees just as hygroscopic as flour, because I think your Honor could take judicial notice of the facts that meats, breads and many other products have a moisture content, and I would submit that the relevance of this case goes far beyond the flour product we are concerned with here, because if your Honor opens the door to a type of packaging, and a type of retailing that doesn't concern itself with moisture content, you would be opening the door to the saturation of a lot of different types of (172) products by the addition of moisture with a result that housewives would not be getting true weight but a lot of water in their products and the City would not be able to do anything about it.

I submit that based on their failure to submit any proof whatsoever, and further on the basis of their profit proffered proof which is not evidence in this case, your Honor has no alternative but to dismiss the complaint with respect to the allegations that the City has unduly burdened the plaintiffs in interstate commerce.

THE COURT: Mr. Graham?

MR. GRAHAM: Your Honor, let me start out by saying that our proof in this proceeding was chartered by your decision in ruling on the City's motion for summary judgment.

Had your Honor ruled otherwise, our proofs obviously would have been more elaborate. We made an effort to stick to the legal issue as your Honor called it in her decision and that was, first to prove that the ordinance was unnecessary burdensome.

Secondly, to prove that the ordinance as enforced imposed a standard substantially more stringent than applicable federal law and thirdly, to prove that municipal requirements exceed the limits necessary and constitute

(173) an illegitimate attempt to control the practices of packagers beyond the borders of New York.

There is a lot in what Mr. Halpern said which I am just not going to respond to. In the interest of brevity, I will limit myself to the issues as we have attempted to prove them.

There is one comment he made which I think is the essence of the problem in this case and that is, that he says his department is not going to tell the millers how to conform to the New York regulations.

Now, we start out with a New York regulation that by its terms requires it shall be unlawful to sell or offer for sale any commodity or article of merchandise at or for a greater weight or measure than the true weight or measure thereof.

No provision whatever for any variation, none. We are dealing in the case of flour with a hygroscopic product. They have admitted that in answer or in response to our request to admit. I believe they have admitted it in their pleadings and Professor Ward testified to the necessity, indeed, the inherent nature of flour and moisture as part of that product.

It isn't as though you had dry stuff on one side and water on the other side. Flour is defined as (174) being up to 15 per cent moisture, and the City concedes that standard of identity and definition. They don't quarrel with it.

Now, when we point out the fact that the ordinance by its own terms makes no provision for variation, the City responds by saying yes, but we temper the application of the ordinance by using Handbook 67 and specifically, the table on page 8 on Handbook 67.

Turning to the table on page 8 on Handbook 67, they are referring to the unreasonable minus or plus errors table. We have put in proof that that table was designed. The information used to create the table was based upon errors in the machines in packing the bags of flour. The table was never designed to create a range of tolerance to cover or to take into account the hygroscopic nature of flour.

The next significant item. Federal regulation pursuant to both the Fair Labeling and Packaging Act and the Food and Drug Act, prescribes, and ordains that reasonable variation be permitted with respect to loss or gain of weight due to atmospheric condition particularly where you are dealing with a hygroscopic commodity. That is what we are dealing with.

The City makes no allowance for gain or loss of (175) weight in hygroscopic commodity, none. They apply the table but the table is designed merely with respect to variations in weight due to the packaging machinery and Mr. Johnson at length explained the method used by General Mills to pack at a standard weight in excess of declared net weight, so that the machine is always in a range well above the declared weight on the package.

With respect to interstate commerce, Mr. Johnson testified of 11 bags that are on a violation, the numbers escape me, seven of them came from Kansas City or seven of them came from Great Falls, Montana.

I think there is little doubt in ~~any~~ body's mind that the plaintiffs in this case are indeed in interstate commerce. That Pillsbury sells its flour worldwide, so does General Mills.

The witness also testified that we sell our flour from the plant and we sell it to large supermarket chains and distribution centers. They can be any place in the metropolitan area.

Again, most of the major supermarkets that I am aware of have them in New Jersey. An A&P, Grand Union, Shop-Rite. Largely it is a question of accessibility of railroad and road.

The fact is, when the mill transports that (176) flour to a distributor, they don't know where it is going to go. They don't know whether it is going to be sold in Jersey City or they don't know whether it is going to be sold in Manhattan.

The burden and the essence of the problem is, that if our mills are required to mill to meet the standard of the City of New York which in our opinion is vastly in excess of the federal standard, indeed vastly in excess of the federal standard, indeed vastly in excess of the standards in any of the 50 states, then it is going to be the tail of the City of New York wagging the dog of the rest of the country because there is no way, as Mr. Johnson testified, the way mills are presently set up, to segregate flour for New York City.

You would have to set up a separate line. You would have to package separately, you would have to package differently. You would have to overpack or run into the problem of moisture barrier packing, the state of art of which hasn't reached the point where they have found one that will produce acceptable flour for the consumer because of storage life problems in flour.

The experience of millers for years and indeed, generations, has been that the paperbag that breathes is good for the product and it is good for flour.

(177) I think we have proved that the ordinance in the City of New York imposes a standard more stringent than that of the Federal Government, simply because we have shown that the ordinance in the City of New

York does not take into account moisture loss. The regulation of the Federal Government does.

With respect to the burden that the enforcement of the ordinance of the City of New York creates on the miller, it is the burden that if you are running a mill that is producing flour interstate and part of that flour is going to New York City, there is just no way you are going to segregate out some of the produce from that mill and allocate it to New York City.

Even if you wanted to, that flour is distributed to wholesalers and there is no way you are going to be able to control what you do with that flour.

When you say 5 pounds net weight on a Gold Medal bag, a wholesaler in Pennsylvania or New Jersey or New York or Staten Island isn't going to know there is a difference between that bag and the bag that ought to go into New York City because of their ordinance.

There is just no rationale or practical way of doing it, and I don't think the City can say we passed an ordinance that we come in and say these are (178) the problems with your ordinance and they can say I hear you, but that is tough, we have an ordinance and you have to obey it, I don't care how you do it and I am not going to make any suggestions to you with respect to how you do it, just do it.

The essence of that is unreasonable, irrational. The millers wouldn't be here unless the City's ordinance created a severe problem for them. We are interested in our customers as well as the City of New York is. Without them we would be out of business.

THE COURT: How do you say the City's ordinance varies from the federal ordinance with relation to more stringent standard?

MR. GRAHAM: I say, your Honor, that the City of New York makes no allowance for loss of moisture in an admitted hygroscopic product. They accept the federal definition of flour as being not more than 15 percent moisture. We have explained that flour is milled, family flour almost universally at a range of 13-1/2 to 14 percent. Not because we want to, because that is the only way you can do it.

What I am saying is when that flour loses moisture in the distribution process or on the grocer's shelf because of the operation of atmospheric conditions (179) that the City has to make an allowance for that. I am saying the Federal Government does make an allowance.

THE COURT: How does the Federal Government make an allowance for it?

MR. GRAHAM: These reasonable variations due to the operation of atmospheric conditions are permitted. The City doesn't say anything. They say if you read their ordinance nothing is permitted. If you temper their ordinance by application of the handbook, they say that the handbook table variation is permitted and our position on the handbook table is that that variation does not apply to moisture.

We are entitled to that variation on the machinery, not on moisture.

THE COURT: The issue is whether the City allows for reasonable variation: isn't it?

MR. GRAHAM: You are absolutely right.

THE COURT: You say the City does not allow for reasonable variation.

MR. GRAHAM: Yes, your Honor, and I say that because I say they misuse the handbook.

THE COURT: Let me ask you this. Are you challenging the finding that was made in the opinion which I rendered on the motion for summary judgment based on the (180) defendant's statement pursuant to Rule 9(g) that the inspectors issue violations only when the flour's package weight is more than 3/8 of an ounce?

Do you dispute that?

MR. GRAHAM: I don't dispute that the inspector—and let me make it very clear—I don't dispute that the inspector goes in and inspects flour and permits the variations or inspects it in accordance with the table set forth on page 8.

What I do say that is unreasonable about that, is he is taking a table that has nothing to do with moisture loss and saying that that table ought to set forth a specific tolerance with respect to moisture loss.

THE COURT: What he does, if I understand the City's position, he allows for that variation which you have just pointed to and which we have found he allows for 3/8 of an ounce. It is only when he finds more that he issues a summons and therein, if I understand the City, the person to whom the summons is issued can come in and show that whatever greater variation than 3/8 there is is due to factors beyond itself, his or her control.

Is that the City's position?

MR. HALPERN: Yes, your Honor.

THE COURT: What is wrong with that position?

(181) MR. GRAHAM: I am saying, your Honor, in the face of a hygroscopic commodity that will gain and lose weight, that position is unreasonable because the

City in terms either of their ordinance or of their practice, has no provision for taking into account moisture loss.

THE COURT: If I understand them, you can come in and show that.

MR. GRAHAM: Your Honor has just articulated their method, which is on an ad hoc basis, that is, package by package, a retailer who hasn't manufactured the thing in the first place can come in and say with respect to this package of flour, let's try a case with respect to moisture content and go down the line with respect to hundreds of packages of flour.

What my client is concerned about is not the leaking bag, the puffing bag with the improper seal, the bag with the hole in it. My client is concerned with the bag that meets every requirement of modern packaging equipment, that it is packed properly, but loses weight between the time it leaves his hand and the time that an inspector in a supermarket in New York inspects it purely because the result of atmospheres conditions on that bag.

The City says I can come in and tell them that (182) the problem in this case is because the bag lost moisture. There is no way in the world I can do that. The procedure that the City has established is one where they issue a violation that says such suit can be avoided by your appearance at 80 Lafayette Street at which time a recommendation for an adjustment and discontinuance may be made.

You go down and they say pay \$10 and nobody is prepared to listen.

THE COURT: You mean nobody permits you an opportunity to be heard?

MR. GRAHAM: Your Honor, I can go in and say—we did do this.

THE COURT: I am asking you what the fact is? Of course the City hasn't put on its case yet, but you are saying that it is the fact that you are not given an opportunity to show what caused the discrepancy between the amount shown on the bag and the actual weight.

MR. GRAHAM: I can go in and tell Commissioner Tish that the problem with any given bag is the problem of the essential nature of moisture in flour and Commissioner Tish in his office and with his volume and with his problems is not prepared for me to interrupt his day and his week to litigate bag by bag a hundred (183 flour violations. That is why we are here. That is why we didn't do it before Commissioner Tish.

Secondly, as far as I can understand, in the City's ordinance and regulations there is no authority for this paragraph on the summons, there is no provision for any statutory hearing.

The next problem, Commissioner Tish, once he makes a recommendation, if he says \$10 a bag and if you don't pay it, the summons says this is being reported to the Corporation Counsel of the City of New York to commence legal proceedings against you for the recovery of a civil penalty in the sum of \$100 for each infraction.

That is on the summons.

Again, the City is wrong. There is no way this is a civil penalty, it is a criminal penalty. The imposition for violation of 833.16 S Section 833.23.0, which provides that any person violating any of the provisions of Section 833.12.0 through 833.22.0 shall be guilty of an offense tryable by a Magistrate and upon conviction thereof shall be fined the sum of not less than \$25 or \$250 for each offense or by imprisonment not exceeding ten days or both.

I submit, your Honor, what we are dealing with here is a quasi-criminal penalty.

(184) THE COURT: You said that you go to Commissioner—

MR. GRAHAM: How can you go on a quasi-criminal case and dispose of it in an administrative hearing.

MR. HALPERN: It first calls for an administrative hearing before Commissioner Tish and they are afforded every opportunity to explain, to offer testimony. Commissioner Tish is here and ready to testify that they never made an offer of proof or any testimony whatsoever. Even if Commissioner Tish would decide against them as he has because they made no offer of proof, nothing happens to them. They are not required to pay. We would have to institute a civil proceeding to collect the penalty assessed.

They would be afforded an opportunity to come into a civil court in the City of New York and present their complete case.

THE COURT: What is the criminal statute he just read?

MR. HALPERN: That is not applicable to these type of proceedings.

MR. GRAHAM: It's applicable by its terms.

MR. HALPERN: They have never been prosecuted under a criminal statute, so they are afforded an opportunity on an administrative level and they are afforded (185) an opportunity in a civil court to come forth and present their proof.

May I just submit one further thing at this point. They have maintained an oral argument that all the weight

loss is due to moisture loss. They have offered or proffered no testimony to establish that any of the weight loss is strictly moisture loss. It could just as well have been powder loss. There is no testimony offered or proffered but they find it expedient to keep harping on the moisture loss even though there was no testimony either offered or proffered that the short weight on these products was solely attributable to moisture loss.

THE COURT: How many bags were originally cited to them as being short?

MISS MODRY: I believe it is 78, your Honor.

THE COURT: In one store?

MISS MODRY: No, your Honor.

THE COURT: How many stores?

MISS MODRY: Four stores.

MR. GRAHAM: Your Honor, the suits that were referred to in the complaint were referred to because essentially they give a standing to bring this action. I believe Miss Furness filed an affidavit that said one (186) of the allegations was harassment and she filed an affidavit saying over the last seven years one of the companies had only been cited 16 times and the other 4.

Since we started the action, there has been a lot of action on the inspection front. I think the other day Mr. Colavito went down to the Commissioner's office on April 25th and 538 bags were the subject of that proceeding.

MISS MODRY: That is over a period of four years.

MR. GRAHAM: That is since this case has started.

THE COURT: 500 bags since this case was started?

MR. GRAHAM. Your Honor, if I may just respond to Mr. Halpern. Mr. Halpern has reiterated the dogma that A, I am entitled to a hearing and B, that they are only entitled to collect 100 bucks.

I would appreciate it if your Honor would ask Mr. Halpern the authority A for the hearing or B for collecting 100 bucks in a civil proceeding.

THE COURT: All right, what is the authority, Mr. Halpern.

MR. HALPERN: If your Honor please, these are sections in the Administrative Code of the City of New York.

If your Honor deems it essential, we can supply it.

MR. GRAHAM: I may be able to help Mr. Halpern out. I believe they are applying Section 833-22.0 and contending that is the basis for their collection of a civil penalty of \$100. That section reads as follows:

"Any person who shall violate any of the foregoing provisions for the regulation of weights and measures shall forfeit and pay a penalty of \$100 for each and every such offense."

What that means, your Honor, your scales are out of balance. The section that applies to commodities, by its own terms is the next section which is 833-23.0 and it says, "Violations: Any person violating any of the provisions of Section 833-12.0 through 833-22.0"—and that section, your Honor, the section we are talking about here is 833-16.0—"shall be guilty of an offense tryable by a Magistrate and upon conviction thereof shall be found the sum of not less than \$25 and not more than \$250 for each offense or by imprisonment not exceeding 10 days or both."

Your Honor, I am not putting in issue the good faith of the Consumer Affairs Department. They have a difficult job in New York and I recognize that.

THE COURT: You did recognize that the ordinance provided for an administrative hearing in any event in (188) addition to that criminal proceeding.

MR. GRAHAM: No, your Honor. The ordinance makes no provision whatsoever for an administrative hearing. I know as a practical matter that the City on its summons will tell you that if you have a problem, come on down to the Commissioner's office and review it with him, but I know of no authority supporting the theory that that is a hearing. Indeed, Commissioner Tish told me it wasn't a hearing. It was for the purpose of settling violations.

I've got a problem that is bigger than just the usual weights and measures problem where some guy is caught out and wants to come down and he has an excuse. I have a serious problem. We manufacture flour nationwide. Nowhere in the country do we have an ordinance or regulation such as the one in the City of New York. Obviously manufacturers are most reluctant to aggravate the Consumer Affairs Department in any jurisdiction but the issue here is we have a product that has moisture in it that gains and loses moisture because of the operation of conditions that are totally beyond our control, namely the weather, and under what circumstances of temperature the flour is stored.

(189) THE COURT: In answer to that, the City says you haven't proved that, either here or in the State Court or in an administrative proceeding.

MR. GRAHAM: My answer to that, I think we have proved that here.

THE COURT: How?

MR. GRAHAM: We have shown through Professor Ward the reason why water is in flour. As a matter of law, flour is defined as being not more than 15 percent moisture. We have shown that the Federal Government in terms of its regulation takes into account that flour will gain or lose moisture depending on atmospheric conditions, and we have also charged—

THE COURT: What is the variance allowed by the federal authorities?

MR. GRAHAM: They make no specific tolerance, because the problem is one that can't be resolved by a specific tolerance unless you get to the point where you direct the manufacturer to over-pack to the extent of the greatest possible loss under the most adverse conditions that you can expect.

That percentage is somewhere in the neighborhood of 6 to 8 percent and that gets us back to the question of does the Federal Government or doesn't it require accuracy with respect to labeling, and the answer to that (190) is yes, it does.

If you require the millers to over-pack 8 per cent on a 5 pound bag, you are getting 5 pounds plus 8 per cent. That flies in the face of everything that has been developed in terms of weights and measures regulations because it is totally inaccurate. The city, state and Federal Government will not let you put a minimum weight on a product.

Why don't you say 5 pounds minimum or 5 pounds when packed. The law with respect to labeling is encrusted with a variety of prohibitions against saving minimum, against saving when packed.

If the law would allow us to explain what I have tried to explain in this case, you might be able to do it on the

label, but it does not. We are severely and strictly regulated with respect to what we can put on the label and all we can put on the label is 5 pounds net weight.

THE COURT: Let's go back to the question I asked. I believe it was with respect to the variances allowed by moisture by the Federal Government. You said there was no particular—

MR. GRAHAM: That is correct. The Federal Government say they will allow a reasonable variation (191) and their inspector will make some effort to find out what conditions the flour has been exposed to.

The only absolute way of determining whether or not there has been a gain or loss of moisture is to perform the air-oven test and that is to burn up the flour and on that basis there are standards for computing the amount of dry stuff in the bag and if you know, as Mr. Johnson testified, the moisture content of the flour at the time the bag was packed and if you know what the moisture content was at the time the test is performed, a simple mathematical addition will tell you whether the bag was or was not underweight, taking moisture into account.

I realize that that is a cumbersome, difficult process. I don't minimize it. I think there are certain areas where an inspector who is sophisticated can draw certain conclusions with respect to a bag of flour.

For one thing, he can pick up a telephone and call an inspector in Buffalo and find out what a specific lot was milled at when it left the plant. If he knows where it is distributed, he could call the local weights and measures inspector in the area where the flour is being distributed and lastly, when he inspects the bag, a sophisticated weights and measures inspector (192) will draw

some conclusions whether the under-weight or short weight is due to moisture loss or due to broken bags, bad seals, bad handling. Those items, that is, seals, leakers, bad handling, I am not here for and I don't defend.

THE COURT: Let me see if I understand you with respect to the federal procedure.

You say you can't give me any help with respect to variations allowed for moisture by the Federal Government. You say you don't know what their tolerance levels are, is that it?

MR. GRAHAM: I am saying to your Honor that if the Federal Government or the federal inspector found a bag of flour that was stored under conditions where he would expect a 6 per cent moisture loss in the stated net weight, because of those conditions he will allow short weight to that extent by reason of moisture loss.

THE COURT: In other words, you are saying then the City of New York ought to allow up to 6 to 8 per cent differentiation with respect to your flour?

MR. GRAHAM: No, ma'am. I am saying under certain circumstances the City of New York ought to allow—I am saying when the relative humidity gets down to 10 per cent in a store and the heat is up to 70 (193) per cent, it would not be unexceptional to find a bag that lost 5 per cent by reason of moisture loss due to evaporation, and I am saying to your Honor that under circumstances such as that, the Federal Government would make that allowance and so would most state inspectors.

THE COURTS: So you are saying that New York City ought to determine what the relative moisture situation was in a particular store.

MR. GRAHAM: I am saying they ought to take it into account, your Honor, and I am saying now they don't

and I am saying therein lies the unreasonableness of what they do.

THE COURT: If I understand them, they simply say that you should be able to come in and explain that to them that that is the reason for the 5 per cent difference and that they should not have to determine in every instance why a law has been violated.

MR. GRAHAM: I understand that they say that but saying that, having an enforcement official saying come in and chat with me about moisture is not the same thing as having a regulation that takes moisture into account. We are a system of laws, not of the whims of a given examiner and the essence of what we have been saying (194) throughout this case is, I am entitled to a regulation in the City of New York that takes into account moisture and moisture loss in a hygroscopic commodity like flour and I am saying the city ordinance and their administrative practice is unreasonable because it does not.

I am not saying that the City under a given circumstances if I walk in and have a fairly good expert testimony wouldn't listen to me on a given violation. I am not saying that, I suspect they will.

What I am saying is that they have an ordinance that doesn't say I am entitled to put on that proof. There is nothing in their practice that allows for moisture loss when they inspect and for that reason, their ordinance is more stringent than the federal regulation and imposes a burden on interstate commerce because basically the only way my clients can insure that they will not be cited for short weight in New York City under the state of the art as it has been for a number of years in the milling industry is to over-pack to an extent that frankly on the one hand would violate federal law and on the other hand, makes a mockery of accuracy of weight labeling.

THE COURT: I think we have been over that. There is no federal law which prohibits you from over-packing. (195) Haven't we been over that?

MISS MODRY: Yes.

MR. GRAHAM: Your Honor, in fairness to you, not necessarily to me, I am aware since the last argument of a brief filed by the Attorney General of the United States on that very subject and frankly, your Honor, it takes a position that is contrary to your Honor's ruling. I do have an obligation to inform you of that brief. I will supply you with a copy of it. I don't intend to rehash something we have gone over before but there is such a brief. It is in a case involving flour, General Mills versus Joseph Jones. The case is pending in the United States Court of Appeals for the Ninth Circuit and the brief was filed by Thomas E. Quaper, Assistant Attorney General.

Also on the cover of the brief are Gregory B. Hovlington, Chief, Consumer Affairs Section, of counsel, Peter Bartonhut. Terry Coleman, attorney.

This is a brief the Government has intervened amicus curae. There is a portion in the brief that supports our position on the accuracy of weight labeling down to the Ts and the dots on the Is.

THE COURT: What position, that there is a federal regulation preventing over-packing?

(196) MR. GRAHAM: Yes. 21 U.S.C. 343E commands that the weight stated be accurate, not under-weight and not over-weight.

I don't really want to rehash something that has gone on before, but I think that you are entitled to have what we have on the subject and that is something new that we have and I think it is worth consideration.

THE COURT: And that applies to bags of flour as we have here?

MR. GRAHAM: Yes, your Honor, that is the position of the Attorney General.

MISS MODRY: I would object to the position of the Attorney General in a California case where we don't know the facts. We also have in California a court declaring that reasonable variation in a federal meatpacking act was too vague a standard to apply and as a result, a proposed regulation that the weight be maintained at all distribution points, but these are really outside our case and outside the facts in this particular case. I don't think the United States Attorney's position in a California case ought to be made part of this record.

MR. GRAHAM: Your Honor, I raised the question as a point of law. As a lawyer I am interested in it as a point of law. I assume Miss Modry is interested in it (197) as a point of law. I am not trying to shove down her throat the opinion of the Attorney General. It is the position of the enforcement arm of the Federal Government with respect to accuracy on weight labeling.

THE COURT: I don't recall, but I thought we asked one of your witnesses yesterday, Mr. Jensen.

MR. HALPERN: I believe several of their witnesses testified there is no prohibition against over-packing.

MR. GRAHAM: What Mr. Jensen did or did not testify—

THE COURT: Let's take the statute on its face then. It doesn't prohibit over-packing taking into account moisture loss which you say normally and naturally result. The statute on its face that you read doesn't prohibit that.

MR. GRAHAM: That depends on how you define accuracy, and what I am saying to you is—

THE COURT: The manifest purpose of it must be that the consumer not be cheated by having the package say 5 pounds when it is in fact 4. That is obvious. We don't have to debate that. If a packer put in 6 pounds because there is going to be that much in moisture loss, there is no court in the world that is going to sustain a conviction of somebody for filling a package over to take (198) into account moisture loss. It doesn't make sense, Mr. Graham. It doesn't make sense for you to stand there and tell me there is a federal statute which would prohibit that.

MR. GRAHAM: I can't, your Honor, but if I may, just on the basis of what your Honor said, it is logical. What I am saying to you is, when you are dealing with labeling, you are dealing with competing interests and philosophies and there are advantages to the consumer in insisting on accuracy and not over-packing, and that is the position of the Government.

The consumer gets a benefit out of that. He knows what he is paying for when he plunks down his dollar and he has some assurance that his dollar relates to the quantity stated on the package.

THE COURT: You say the consumer is going to complain if he goes in the store, buys a 5 pound bag of flour and in fact it weights 5-1/2. The consumer is going to complain to the Consumer Commission of New York, is that it?

MR. GRAHAM: Your Honor, what I am saying is that the consumer's representative, the United States Government has complained, yes, your Honor.

THE COURT: What have they complained about?
(199) It escapes me.

MR. GRAHAM: They have complained of any ruling that interferes with the requirement of 21-33 E, whether the weight stated be under-weight or over-weight and they complain about it because it has taken years, virtually years to develop a system of weights and measures in this country that is reliable in terms of translating what you are getting in terms of weight into the dollars you are paying for it and it is as significant a principle as making sure that the consumers get what the package says they are going to get and nobody says that that isn't not only appropriate but desirable, from everybody's point of view.

THE COURT: Do you have anything else on the commerce burden?

MR. GRAHAM: I rely on the papers we have submitted to your Honor. I rely on the testimony of the witnesses that we have presented and I respectfully suggest your Honor that we have met our burden for the purpose of requiring the defendants to proceed with their case.

THE COURT: Have you found those statutory citations or ordinance citations yet?

MR. HALPERN: I would submit to your Honor there (200) is general procedure, general sections in the Administrative Code. We don't know the numbers that set forth the procedure that the Commissioner of Consumer Affairs has the general power to conduct hearings in any type of area that she is concerned in. This is under the Consumer Protection Law.

COMMISSIONER TISH: Local law under 1968.

THE COURT: Do you have a copy of that?

MR. HALPERN: We can supply it to your Honor.

MISS MODRY: This is not the type of hearing that results in a determination that is enforceable against the miller or against the retailer. Before we go to court, the Consumer Affairs goes to court, there is an informal hearing in which the retailer is given an opportunity to present his defense.

THE COURT: That occurred here?

MISS MODRY: Yes.

MR. HALPERN: It occurs in every case.

THE COURT: Then you filed a complaint in the Civil Court of New York?

MISS MODRY: We would. We did not in any case here because of the pendency of this case.

THE COURT: Is this a case where we had an agreement regarding—

(201) MISS MODRY: Up to the time of the entry of preliminary injunction, we agreed not to proceed with any court enforcement.

THE COURT: No court complaint having been filed up to that point.

MISS MODRY: That is correct.

THE COURT: But you were about to proceed?

MISS MODRY: After the hearing we normally proceed with a judicial hearing. It is a *de novo* hearing.

THE COURT: What happened at the administrative level?

MR. HALPERN: I would assume if they just came in and offered no explanation, the general procedure is that a fine would be assessed but this fine is not in force. It has no force and effect at that time.

If they don't pay this fine, we would then have to proceed in court, start de novo in court with a court proceeding, so they are afforded an opportunity.

We can't assess a fine in an administrative hearing then proceed to collect it like a judgment. They will be afforded an opportunity in court. We then would have to proceed de novo in a civil court by serving a civil court summons.

THE COURT: But in this case they didn't make any (202) showing at all?

MR. HALPERN: They make no showing at the administrative hearing. Of course they have that option. They could even refuse to come to the administrative hearing in which case we would have to proceed de novo. This from what I gather is in the nature of an informal nature which is in their benefit to come in and explain the circumstances to us.

MR. GRAHAM: Could I review that just for the record in view of the statements that have been made.

THE COURT: All right.

MR. GRAHAM: Prior to our institution of this suit, we went in, three representatives of my company, Mr. Joyce being a representative of Pillsbury, Mr. Sumpter being a representative of Seaboard and I forget the guy who represented General Mills.

They went over this matter in detail with Mr. Bernard Sack. Mr. Sack wrote a letter to us dated March 15, 1973 where he rejects whatever effort we made.

THE COURT: What effort did you make?

MR. GRAHAM: We gave him the entire record in the New Jersey case where this problem came up about nine years ago and reviewed it and rejected it.

He said essentially what has been said here. We (203) have an ordinance, that is your problem. We are not giving you any indication how to handle it but it is not our problem and we are not interested in your argument that flour loses weight because it is hygroscopic.

With respect to the specific violations—

THE COURT: Is this something recorded that you are telling me?

MR. GRAHAM: Yes. It is attached to Betty Furness' affidavit which has been filed in the courts.

MISS MODRY: I have a copy of it with me.

MR. GRAHAM: The next step. We had a number of violations pending prior to the institution of this action. I did not know what this hearing was and I had been able to find no authority for it.

On the other hand, I am well aware of the principle of law that says that you must exhaust your administrative remedies before you go to court. With respect to the first set of violations, I asked Mr. Condon's office to go in, appear, not say anything, have a recommendation made and go home. I exhausted my administrative remedy so I could stand before your Honor and argue the bona fides of my case.

THE COURT: That is exhausting your administrative remedies to appear and say nothing?

(204) MR. GRAHAM: I am not sure that that administrative hearing is an administrative hearing, but whatever it was I didn't want to face the defense that I am sure the City would raise that I had an administrative forum for my problem.

I didn't want to litigate my problem in an administrative forum. I wanted to litigate it in the United States District Court.

THE COURT: I don't understand that position. If there is a rule which requires you as a matter of judicial administration to exhaust your administrative remedies, I don't know you can say I refuse to exhaust them, I just want to go to court. I just appear pro forma.

You would have to claim that there must be a precise administrative remedy set forth in the statute or ordinance. That would have to be the law before you could say there is no administrative remedy. The City says that there is, that they have had them and that there is some general provision for it, so it appears there is an administrative remedy and I don't know that you can take the position that I won't exhaust the administrative remedy, I will just appear and go on to court.

MR. GRAHAM: Mr. Condon renewed all of the (205) arguments made to Mr. Sack and he was told that Mr. Sack's letter of March 15, 1973 stands.

At that point, the case is in limbo. The hearing with respect to the specific violations we attended whatever it is that you attend before the Consumer Affairs Division. They had recommended a \$10 fine on each bag and no recommendation had been made with respect to proceeding in Corporation Counsel's office, but they continued to inspect.

Since we started the suit they have inspected frequently and often and a number of bags of flour have been cited. Your Honor is aware that there was a stipulation between counsel for the City and my office that they would not proceed with those violations until your Honor resolved the preliminary injunction against us.

The City has been unwilling to delay further the proceedings with respect to the flour. Those proceedings were scheduled for April 25th.

THE COURT: What proceedings?

MR. GRAHAM: Whatever it is that we do before the Commissioner. You go in and whatever the hearing is that you have.

THE COURT: You mean they have set another hearing for you?

(206) MR. GRAHAM: I have about three or four or five of them coming up as I understand it.

THE COURT: April 24th?

MR. GRAHAM: My thought was, I am not going to run away, I represent fairly substantial remedies.

THE COURT: The issue is whether at the moment you have exhausted your administrative remedies.

MR. GRAHAM: There is no question about it with respect to the violations that are the subject of this complaint. There is also no question that I have exhausted my administrative remedies with respect to 538 violations.

THE COURT: You went in and showed them a case in New Jersey nine years old, is that it?

MR. GRAHAM: A case and a record. Entire testimony. We tried to explain the problem to them.

THE COURT: You tried to explain what?

MR. GRAHAM: That flour will lose moisture depending upon the conditions under which it is stored. That when an inspector inspects a bag in New York what we get is a violation. It makes no indication A whether the bag he is inspecting was declared short weight because it leaks, because it had an improper seal. The conditions under which it was stored. We don't even have the bag of flour. The City says they rely on Handbook 67, your

(207) Honor, with respect to their inspections. Handbook 67 says with respect to an inspection, that if you are going to prosecute, and the City in terms of these summonses has every intention of prosecuting, it recommends, your Honor, that the inspector either confiscate the bag, prosecution, in which case it is advisable to purchase or confiscate evidence as samples of violation.

We don't even have the bags. When the inspector goes into the supermarket, he orders them off sale.

We distribute flour through the United States. When an inspector goes into a retail supermarket and inspects a bag of Gold Medal flour, and he sees the short weight, the retailer calls us up and says give us credit for a bag of flour. The City doesn't preserve the evidence, there is no way in the world I can show what the moisture content of that bag was because I don't have the bag of flour.

THE COURT: He doesn't bring it in to show you the bag?

MR. GRAHAM: Absolutely not.

THE COURT: We are going to take a recess in this case at this time. Try to find that ordinance, please.

MR. HALPERN: I will clarify it for the record (208) right now.

As I understand the procedure, there is no specific provision in the Consumer Protection Law for this hearing. This hearing is for the benefit of the person being charged. If he doesn't want to come in, he is not required to come into this hearing whatsoever. Nothing will happen to him as a result of his not coming in. This is for his benefit to come in and explain. If he doesn't, we will then be compelled to commence a civil suit to collect the penalty.

This is a preliminary step for the benefit of the person charged to have him come in and offer an explanation to us. He is not required to come in. There is no specific provision in law that he must come in. There is no specific provision for administrative hearing. This is done on an informal basis for the benefit of the person charged.

If they don't want to come in, that is their option. If they don't want to submit proof on an administrative level, that is their right. They will be given the right in a court of law. They are afforded two opportunities. At the administrative level and in a New York City court of law to present their case, your Honor.

(209) THE COURT: All right. We will recess now for about 15 minutes.

(Recess.)

THE COURT: I believe at the time we recessed the City had just explained that there was no formal requirement for a hearing before the Commissioner in the local ordinance or in any state statute, but this was merely a procedure the Commissioner had established for informally trying to resolve these matters before resorting to a civil court proceeding.

With respect to the defendant's motion, however, made at the end of the plaintiffs' case, I want to reserve decision at least until I am satisfied as to what kind of defenses are recognized in that civil court proceeding and determine more precisely whether the plaintiffs here exhausted their administrative remedies such as is provided here to try to informally decide that.

With respect to the civil court proceeding, what defenses, if any, have been recognized? The plaintiffs here complained that some person working in the Consumer

Affairs office whose name I don't remember, refused to hear this defense that the weight differential resulted from moisture loss. Is that true? Is that the City's position? Will I hear no such claim?

(210) MISS MODRY: It is not, your Honor. The letter that was referred to specifically makes reference, March 15th, which was signed by Deputy Commissioner Bernard Sack and it specifically allows anyone who has a notice of violation, which I must point out is not legal process, to come in and say that the loss was unavoidable and was solely due to—that they engaged in good distribution practice and they know that there will not be imposed a violation.

I just want to locate that letter.

MR. HALPERN: May I submit to your Honor in the interim, this is a due process argument. Your Honor has already decided the due process issue here. I think where counsel for the plaintiffs is trying to cloud the issue before your Honor. There is no issue of due process before the Court at this trial. The issue is an undue burden on interstate commerce as applied and I would submit to your Honor that we make no defense of failure to exhaust administrative hearings. That is not an issue here.

It is being raised first by the plaintiff. We don't allege in our papers that they must exhaust their administrative remedy before a court proceeding. In fact, we have the burden in the first instance to bring a court (211) proceeding and the issues would be resolved at the court proceeding before a judge of a local court.

They could raise every issue that they are raising here in a local New York City court.

THE COURT: The issue is whether this would be a recognized offense. They claim that it wouldn't be and that they are just arbitrarily fined for having short weight because this defense is not going to be recognized anyhow.

MR. HALPERN: If your Honor please, as a result of our administrative hearing, they are not fined as such because there is no provision to enforce that. This is just a recommendation of a settlement at the administrative hearing. They come down to an administrative hearing. We make a recommendation for settlement. If they don't agree to the recommendation of settlement, it is then incumbent upon the City to institute a court action to collect the penalty prescribed.

They are under no mandate until such time as we go to court to be fined or to pay a fine. There is no mandate. It is strictly a recommendation, and I can state this for the record because it is my division in the Corporation Counsel's office that handles the court proceedings. It is strictly a proceeding set up, an (212) informal type of proceeding to afford them an opportunity to come in, to be heard if the administrative officer of Consumer Affairs feels there is credance to their position, he will take no further action. If he feels they have failed to meet the burden, he would make a recommendation. It has no sanction civil, criminal whatsoever.

The first step toward fixing or exacting a sanction be it civil or criminal and we don't bring any criminal proceeding, will be instituted by service of a summons and complaint.

THE COURT: Is the answer to the question yes, that this would be something that he could show in the civil proceeding?

MR. HALPERN: In the court?

THE COURT: Yes.

MR. HALPERN: By all means. We can't foreclose him in a court of law to bring in whatever evidence he cares to bring in.

MISS MODRY: Your Honor, I can make specific reference. The letter referred to by Mr. Graham says specifically when the products are in interstate commerce, the burden of going forward with evidence and the burden of proof are upon the vendor to establish a claim that (213) variations were caused, after the introduction in interstate commerce, by ordinary and customer exposure to conditions that normally occur in good distribution practice and that unavoidably result in change of weight or measure.

THE COURT: That is the letter that they received?

MISS MODRY: That they received and that Mr. Graham earlier referred to and I think it is part of the record. It was part of the record on the motion for summary judgment.

Commissioner Sack goes on to state, the mere assertion that climatic conditions of storage which have an effect on net weight or not evidence that all affirmative action has been taken to counteract and it goes on.

This specific defense is given to them in an informal hearing or in a civil judicial proceeding.

THE COURT: With respect to the City's motion to dismiss the plaintiffs' action here or with respect to this issue on the ground that there is no interstate commerce shown, the Court would have to deny the motion on that ground. I think in effect that has been shown.

With respect to the remainder of the motion, it seems to me that that would have to be granted for failure of

the plaintiffs to show that the ordinance unduly burdens commerce. Of course, this is a nonjury (214) trial and the Court would have to make findings and conclusions and set all this out in a memorandum opinion which I will do.

Unless there is something further on the part of plaintiffs or the defendant which you would like to bring to my attention now, I would say that the motion to dismiss for failure to carry their burden of proof as outlined in the opinion previously rendered would have to be granted and I will render a memorandum opinion as I have indicated writing it out.

MR. GRAHAM: Your Honor, I do have one thing further, if I may. Not with respect to this issue, but there are a number of violations that are just sitting out here. I understand your Honor's ruling. Obviously the case is of importance to us and I intend to pursue it.

May I request at this time that further proceedings on these violations be stayed pending ultimately resolution of this matter.

That does not prohibit the City from inspecting and citing, but it at least keeps the case in manageable form. If they continue to inspect and prosecute, then we are going to have a multiplicity of lawsuits all involving the same issue and I would like to avoid that and I think the City might like to avoid that. What we want (215) is a definite interpretation of what the City's ordinance means and whether it is valid or invalid. I don't know what the City's position on it is as of right now and in light of your Honor's ruling. For a while we had a stipulation with respect to deferring prosecution until the preliminary injunction has been resolved. Since then the City has been unwilling to enter into any such stipulation.

I make the application that in light of your Honor's ruling that this matter be deferred until it is finally determined, or all of these matters be deferred until it is finally determined.

THE COURT: It is finally determined except that I have to write it out as the rule requires because it is non-jury.

If you are asking for a stay of some kind or some injunction pending appeal, you would probably have to take that up with the Court of Appeals.

Is the City agreeable to this suggestion not to proceed?

MR. HALPERN: No, your Honor.

MR. GRAHAM. I believe in terms of the complete court, your Honor, I must ask you first. If your Honor decides in the negative, you are quite correct, my option (216) is to go and ask for relief from them.

THE COURT: The only thing I can say is, I will try to get out this memorandum opinion as soon as possible. We have many things ahead of it. That is why I gave you an oral opinion anyway so you would have some idea, but when we can get the writing out, I can't say. Hopefully within the next couple of weeks.

I understand the transcript will be ordered and I could do it with reference to that.

What I would say then, as soon as we get this out, you can make the application and I gather that it would be an application for an injunction pending appeal as opposed to a stay of an injunction issued.

I don't know exactly what form it would take but normally if I issued an injunction, you might ask for a stay of that pending appeal but here no injunction is

being issued so I guess you would have to make some kind of application for an injunction pending appeal.

MR. GRAHAM: All right.

THE COURT: You try to put that in some kind of written form between now and the time I get out the opinion.

MR. GRAHAM: All right, your Honor.

(Adjourned.)

**Plaintiffs' Notice of Motion for an Injunction
Pending Appeal
(Filed May 22, 1974)**

TO: **ADRIAN P. BURKE, Esq.**
Corporation Counsel, City of New York
Municipal Bldg., New York, New York 10007

PLEASE TAKE NOTICE that on _____ at
— o'clock in the forenoon or as soon thereafter as counsel
may be heard, the undersigned attorney for plaintiffs,
General Mills, Inc., The Pillsbury Company, and Seaboard
Allied Milling Corporation, will apply to the Honorable
Constance Baker Motley, or to such other Judge as may
be sitting to hear motions in the United States District
Court for the Southern District of New York at the Fed-
eral Building in Foley Square, New York, New York, for
an injunction during the pendency of an appeal from the
final judgment herein restraining and enjoining the defen-
dant from instituting prosecutions arising out of the im-
position and enforcement of §833-16.0 of the Adminis-
trative Code of the City of New York, Chapter 36, Title
A, on plaintiffs' flour sold at retail within the City of New
York from January 17, 1973, and thereafter to and includ-
ing the date upon which plaintiffs' appeal is ultimately re-
solved.

In support of their motion, plaintiffs will rely upon the
affidavit annexed hereto and made a part hereof and upon
the brief submitted herewith.

WILLIAM J. CONDON
Attorney for Plaintiffs
420 Lexington Avenue
New York, New York 10017

OF COUNSEL:

CARPENTER, BENNETT & MORRISSEY
744 Broad Street, Newark, New Jersey 07102

**Affidavit of Jerome J. Graham in Support of
Plaintiffs' Motion for an Injunction
Pending Appeal
(Filed May 22, 1974)**

STATE OF NEW JERSEY:

ss:

COUNTY OF ESSEX : :

JEROME J. GRAHAM, JR., of full age, being duly sworn, according to law, upon his oath deposes and says:

1. I am a partner in the firm of Carpenter, Bennett & Morrissey, and I am familiar with all of the pleadings and facts surrounding the above-referenced litigation.

2. Plaintiffs commenced this action on June 5, 1973, for the purpose of obtaining a judgment.

(a) declaring that the imposition of §833-16.0 of the Administrative Code of the City of New York, Chapter 36, Title A on each plaintiff's said flours is unlawful and beyond defendant's authority on the ground that the Code and its enforcement constitute:

(i) an unconstitutional taking of plaintiffs' property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States;

(ii) an unlawful attempt on the part of the City of New York to regulate interstate commerce and an unlawful and unreasonable burden on interstate commerce in that §833-16.0 of the Administrative Code of the City of New York by its terms and as implemented by the City conflicts with the provisions of the Federal Food, Drug and Cosmetic Act and the Fair Packaging and Labeling Act pursuant to Congress' power to regulate interstate commerce under Article 1, Section 8, Clause 3 of the Constitution of the United States;

(iii) an invalid encroachment on an area necessarily and expressly preempted by the Federal Government in that §833-16.0 is in addition to, different from, and in conflict with laws of the United States and regulations duly promulgated thereunder which are the supreme law of the land.

(b) for injunctive relief.

3. The application for a preliminary injunction and cross motions for summary judgment were argued on January 28, 1974; and by order of the Court, plaintiffs' motion for a preliminary injunction was denied, and defendant's motion for summary judgment was granted in part.

4. However, trial of plaintiffs' motion for a permanent injunction was directed but limited to the issue of whether §833-16.0 of the Administrative Code of the City of New York as applied to plaintiffs unnecessarily burdens interstate commerce.

5. This trial was held on April 29, 30 and May 1, 1974, and at the conclusion of plaintiffs' case, defendant's motion to dismiss by reason of plaintiffs' failure to sustain its burden of proof on the issue of whether or not §833-16.0 as applied to plaintiffs unnecessarily burdened interstate commerce was granted.

6. In support of its opposition to plaintiffs' motion for a preliminary injunction, the then Commissioner of Consumer Affairs, Betty Furness, filed an affidavit wherein she stated:

"Plaintiffs have claimed that I and the inspectors of my Department have 'harassed' them in our enforcement of §833-16.0. The baselessness of this claim is evidenced by the attached compilation of all flour

violations issued under §833-16.0 over the past seven years, prepared by J. M. Robinson, Assistant to the Director of Field Operations of the Department of Consumer Affairs. (Defendant's Exhibit '4'.) This list, prepared from records in the Department, shows that during the nearly seven-year period of 1-26-67 to 10-15-73, plaintiff Pillsbury's flour was the subject of violations on sixteen occasions and plaintiff General Mills' flour (Gold Medal) was the subject of violations on four occasions. (The brand or brands of flour packed by plaintiff Seaboard are unknown to me.) That relatively few violations regarding flour have been issued is further evidence that the objective federal guidelines employed by the Department embody reasonable standards of variation."

7. Since the filing of Miss Furness's affidavit, there have been 31 inspections of plaintiffs General Mills' and Pillsbury's flour and 551 violations alleged. Prosecution pursuant to the Administrative Code with respect to the foregoing violations has not as yet been instituted; and during much of the pendency of this suit, Corporation Counsel, by stipulation, agreed that he would not prosecute any court actions, civil or criminal, to recover the penalties arising out of the alleged violations at issue pending disposition of plaintiffs' application for an injunction.

8. In view of the fact that this case has been pending for eleven months, and in view of the fact that inspections of flour at the retail level by the Consumer Affairs Department have obviously not been hindered, and in view of the fact that although the Consumer Affairs Department has alleged violations of its Administrative Code, §833-16.0, as a result of those inspections it has not instituted penalty proceedings pursuant to §833-23.0 of the Administrative Code, and in view of the fact that sub-

stantial issues of law and fact have been raised on the face of plaintiffs' pleadings, motions, affidavits, and at trial, and in view of plaintiffs' intention to appeal from the interlocutory order of this Court of March 5, 1974, as well as the final determination by this Court of the issues reserved for trial, the plaintiffs respectfully request in light of the foregoing circumstances that the Court exercise its discretion and maintain the status quo by enjoining and restraining the defendant City of New York during the pendency of this appeal from initiating prosecutions of alleged violations of §833-16.0.

/s/ Jerome J. Graham, Jr.
JEROME J. GRAHAM, JR.

NOTARIZED

**Affidavit of Joseph Halpern in Opposition to
Plaintiffs' Motion for an Injunction
Pending Appeal**
(Filed June 26, 1974)

STATE OF NEW YORK)

ss:

COUNTY OF NEW YORK)

JOSEPH HALPERN, being duly sworn, deposes and says:

1. I am an attorney in the office of the Corporation Counsel of the City of New York, the attorney for the defendant Betty Furness in her former capacity as Commissioner of the Department of Consumer Affairs of the City of New York.

2. This affidavit is submitted in opposition to a motion made by the plaintiffs for an injunction enjoining the defendant from instituting prosecutions to enforce the short-weight provisions of Chapter 36, Title A of the Administrative Code of the City of New York during the pendency and until the ultimate resolution of an appeal by the plaintiffs from the final judgment in this action. The plaintiffs apparently make no distinction between §833-22.0 which provides for a civil penalty of \$100 and §833-23.0 which provides for a criminal fine ranging from \$25 to \$250 for each offense.

3. The plaintiffs are seeking by this motion the very relief this Court determined they were not entitled to by an order of March 5, 1974 which denied the plaintiffs' motion for a preliminary injunction and granted, in part, the defendant's motion for summary judgment, and further by a final determination made after trial on May 1, 1974 dismissing the plaintiffs' action. Should the Court grant the plaintiffs the intermediate injunction they now

seek it would not only be a nullification of the Court's own adjudication on the merits but would in effect grant relief to which the plaintiffs have failed to establish their entitlement. This relief would be for an indefinite period of time measured only by the plaintiffs' diligence in perfecting the appeal and the time frame of the appellate process. Such a result is totally unwarranted after a judicial determination that the plaintiffs have failed to establish the merit of their claim, in fact and in law.

4. Jerome J. Graham, Jr., one of the attorneys for the plaintiffs and the affiant in support of their motion, states in paragraph 8 of his affidavit that the defendant has not instituted any (criminal) penalty proceedings pursuant to §833-23.0 of Chapter 36, Title A, of the Administrative Code and further that the Corporation Counsel, by stipulation, agreed that there would be no prosecutions of court actions, civil or criminal, "during much of the pendency of this suit. In actuality, the stipulation of forbearance was limited to the hearing date in the District Court. Now that the matter has been heard and decided in the District Court the stipulation has no relevance.

5. Additionally, the fact that the defendant has not instituted any criminal prosecutions to date has no relevance to the plaintiffs' application. As was stated at the trial, the Department of Consumer Affairs conducts administrative hearings on all short-weight violations which hearings culminate in recommended amounts in settlement of the civil penalties. Where the parties charged with the violations refuse to pay the recommended settlement amounts, it is incumbent upon the department to institute civil court actions to recover these penalties (transcript pgs. 211-12). The fact that a governmental agency has not undertaken criminal prosecutions in the past should not constitute a basis for enjoining the gov-

ernment from so proceeding in the future, given circumstances which justify the imposition of criminal sanctions.

6. Moreover, while the local ordinance provides for criminal fines, neither the plaintiffs nor their attorneys allege that the plaintiffs have been threatened with criminal prosecutions or that retailers, the parties to whom violation notices are issued, have ever been threatened with criminal prosecutions.

7. It is submitted that there is no justification for granting interim injunctive relief to the plaintiffs pending an appeal when injunctive relief, both preliminary and permanent, was denied to them after a trial.

WHEREFORE, it is respectfully requested that the plaintiffs' motion be denied.

/s/ Joseph Halpern
JOSEPH HALPERN

NOTARIZED

**Memorandum Opinion and Order
Dated June 26, 1974 Denying
Motion for an Injunction
Pending Appeal
(Filed June 26, 1974)**

Memorandum Opinion and Order

Plaintiffs, pursuant to Rule 62(c), Fed. R. Civ. P., seek an injunction, during the pendency of their appeal from this court's denial of their motion for a permanent injunction, restraining the commencement of prosecutions for alleged violations of §833-16.0 of the Administrative Code of the City of New York by retailers of plaintiffs' flour products.

Plaintiffs' motion for a preliminary injunction was denied and defendant's motion for summary judgment was granted in part in an order entered on March 8, 1974. (See also Opinion, February 22, 1974.)

On May 1, 1974, the court, at the conclusion of the trial of the permanent injunction, denied plaintiffs' motion for permanent injunctive relief and granted defendant's motion to dismiss the complaint. An opinion will follow.

Four factors must be considered in determining whether an injunction pending appeal should be issued: 1) the likelihood of success on the merits of the appeal; 2) likelihood of irreparable harm; 3) whether a stay would substantially harm other parties to the litigation; and 4) harm to the public interest. *Belcher v. Birmingham Trust National Bank*, 395 F. 2d 635 (5th Cir. 1968).

Plaintiffs have not shown a likelihood of success on appeal. The court does not regard the legal conclusions upon which its prior rulings rested as sufficiently doubtful to

Memorandum Opinion and Order
Dated June 26, 1974

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make a successful appeal likely enough to warrant injunctive relief.

Moreover, plaintiffs have not shown that the commencement of enforcement proceedings would do them irreparable harm. It is doubtful that such judicial proceedings would harm their reputations any more than the issuance of violations by the defendant has already done. Furthermore, plaintiffs have not shown that they could not raise any defenses they might have in such enforcement proceedings. Assuming, as this court must, that plaintiffs, or their retailers, would have an adequate opportunity to defend themselves in any enforcement proceedings, the court cannot find that their rights might be irreparably harmed.¹

The motion for an injunction pending appeal is accordingly denied.

Dated: New York, New York
June 24, 1974

SO ORDERED:

CONSTANCE BAKER MOTLEY
U.S.D.J.

1. Compare *Sheffel v. Thompson*, 42 U.S.L.W. 4357 (U.S., March 19, 1974); *Dombrowski v. Phister*, 380 U.S. 479 (1965).

Here, prosecution of civil enforcement actions pending appeal would have no chilling affect on fundamental constitutional rights. Moreover, as noted above, plaintiffs will have an adequate forum to raise their federal defenses.

**Memorandum Opinion and Order
Dated July 3, 1974, Dismissing the Complaint
(Filed July 3, 1974)**

Memorandum Opinion and Order

Plaintiffs, who are manufacturers and packagers of wheat flour, have brought this action for a declaratory judgment. Jurisdiction is based on 28 U.S.C. §§1331(a), 1332(a) 1337.

Plaintiffs have requested injunctive relief against the Commissioner of Consumer Affairs, City of New York, to restrain the enforcement of Section 833-16.0 of the Administrative Code of the City of New York against retail distributors of their flour products.

The ordinance makes it ". . . unlawful to sell or offer for sale any commodity or article of merchandise, at or for a greater weight or measure than the true weight or measure thereof . . ."

The essence of plaintiffs' claim is that the city ordinance does not allow for reasonable weight variations resulting from inevitable losses of moisture and, therefore, violates Due Process and imposes a burden on interstate commerce. Plaintiffs also claim that the ordinance is pre-empted by the federal Fair Packaging and Labeling Act, 15 U.S.C. §1431, et seq., and the Food, Drug, and Cosmetic Act, 21 U.S.C. §301, et seq.

The court, in an opinion dated February 22, 1974, ruled that the ordinance did allow for reasonable weight variations resulting from moisture loss. The court also ruled that the ordinance, as applied, did not deny plaintiffs their rights under the Due Process Clause and that the Commerce Clause does not bar all state and local regulation of weights and measures of packages which have

been transported in interstate commerce. The court denied plaintiffs' motion for preliminary injunction and granted defendant's motion for summary judgment, in part. The court limited trial of the permanent injunction to the question whether the city ordinance unnecessarily burdens interstate commerce. It was ruled that plaintiffs would have to prove first that the ordinance, as applied, imposed standards substantially more stringent than those of applicable federal laws and that the municipal requirements exceeded the limits necessary to vindicate legitimate local interests, unreasonably favored local producers, or constituted an illegitimate attempt to control the conduct of packagers beyond the borders of New York State. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 154 (1963).

The trial of the permanent injunction was concluded on May 1, 1974. The court at that time denied plaintiffs' motion for a permanent injunction and granted defendant's motion to dismiss the complaint for the reasons herein.

It appears that the city ordinance is substantially more stringent than the applicable federal statutes, as applied. Both the city ordinance and federal regulation permit reasonable variations caused by loss of moisture during the course of good distribution practice.¹

However, plaintiffs offered testimony that federal inspectors do not examine packages on retailers' shelves.

1. With regard to the city ordinance, see this court's opinion, dated February 22, 1974, at p. 4 [JA132a-33a].

The federal regulation provides as follows:

"The declaration of net quantity shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large." 21 C.F.R. 18b(g) (1973).

*Memorandum Opinion and Order
Dated July 3, 1974*

(Testimony of Malcolm Jensen.) Since much of the moisture loss occurs after the packages leave the manufacturers' plants, examinations by city inspectors conducted at retail stores are likely to result in discoveries of moisture losses which federal inspectors do not detect.

Nevertheless, plaintiffs have not shown that the city ordinance is unnecessarily burdensome. There has been no showing that the ordinance's enforcement unreasonably favors legal producers and plaintiffs have not shown that the municipal requirements exceed the limits necessary to vindicate legitimate local interests.

In view of a municipality's interest in regulating weights and measures, "one of the oldest exercises of governmental regulatory power," *Swift & Company v. Wickham*, 230 F. Supp. 398, 402 (S.D.N.Y. 1964) (three-judge court), aff'd. 364 F. 2d (2d Cir. 1966), cert. denied, 385 U.S. 1036 (1967), a city must be afforded wide discretion in determining what variations from stated weights are reasonable.

Plaintiffs' principal argument is that defendant, in issuing violations against retailers, mechanically applies a table of "unreasonable minus or plus errors" contained in a handbook prepared by the U.S. Department of Commerce, National Bureau of Standards (Handbook 67, National Bureau of Standards, Exhibit A, attached to Answer). Plaintiffs contend that the table was not intended to apply to weight variations resulting from moisture losses and, therefore, does not make adequate allowance for such losses. However, it is not enough to show that defendant applies the table in a manner contrary to the intent of the handbook's author. The question, for purposes of the Commerce Clause, is whether the city's requirements exceed the limits necessary to vindicate its interest in protecting consumers from misleading labeling practices.

The handbook has no binding effect on states or municipalities since it merely describes "a method for controlling various types of pre-packaged commodities" (Handbook 67, p. 1). The question is whether the city is acting reasonably when it concludes that variations of the magnitude described in the table are ordinarily unjustified, bearing in mind that the table is only used to determine whether there has been a *prima facie* violation of the ordinance.

The court cannot find that the city is acting unreasonably when it issues violations based on weight variations in excess of those allowed in the table. As the court held in its opinion of February 22, 1974, the city could rationally conclude that ordinarily weight variations greater than those indicated in the table were unjustified. Such variations may be the result of factors other than moisture loss, such as under-fills by the packagers or leaks in the packages. Variations may also be the result of excessive moisture losses resulting from poor distribution practices. An inspector cannot be required to determine, in advance of issuing a summons, whether a weight variation is impermissible. It is enough that after the summons is issued the retailer be afforded a reasonable opportunity to show that the weight variation was unavoidable.

In this connection, the city contends that when a violation is issued, the retailer is afforded an opportunity to meet informally with city officers to attempt to reach a settlement with the city. If a settlement cannot be reached or if a retailer fails to appear at the settlement conference, the city could commence civil proceedings to collect a penalty of \$100 for each violation, Administrative Code of the City of New York, §833-22.0, or criminal prosecutions, §833-23.0. Plaintiffs have made no showing that the fact that weight variations resulted from inevitable moisture losses would not be recognized as a defense in

Memorandum Opinion and Order
Dated July 3, 1974

such proceedings. They have, therefore, failed to show that the ordinance, as applied, exceeds the limits necessary to protect the city's legitimate interest in fair packaging.²

Finally, the court finds that the ordinance, as applied, does not constitute an illegitimate attempt to control the conduct of packagers beyond the borders of New York. The city has a legitimate interest in regulating weights and measures even though its regulations may inevitably require out-of-state packagers to alter their practices to conform to the local standards. So long as the city acts reasonably, such regulations do not unnecessarily burden interstate commerce.

Plaintiffs' motion for a permanent injunction is denied and defendant's motion to dismiss the complaint is granted.

Dated: New York, New York
July 2, 1974

SO ORDERED:
CONSTANCE BAKER MOTLEY
U.S.D.J.

2. Plaintiffs have not argued that there is no legitimate interest in preventing excessive moisture losses, although they did argue, unsuccessfully, on the defendant's summary judgment motion, that the city, as opposed to the federal government, had no such legitimate interest.

It is arguable that there is no legitimate interest because the consumer can always add tap water to make up for excessive moisture losses. However, the consumer would ordinarily have no way of knowing that water could be added without diluting the mix. The city might rationally conclude that consumers who did not know that their flour packages were short-weighted as a result of moisture losses and that additional water could, therefore, be added to recipes without diluting the mix would, in order to meet their cooking needs, end up buying more flour than they would have if excessive moisture had not been lost.

It might be noted that the federal regulation also seems to proscribe variations from stated weight caused by excessive moisture losses. See p. 4 and n.1 *supra* [JA323a].

Notice of Appeal
(Filed July 25, 1974)

Notice is hereby given that plaintiffs, General Mills, Inc., The Pillsbury Company and Seaboard Allied Milling Corporation, hereby appeal to the United States Court of Appeals for the Second Circuit from the partial summary judgment previously entered in this action and from the final judgment entered in this action on July 3, 1974, and from the Order entered on June 26, 1974, denying plaintiffs' application for an injunction pending appeal.

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J. Halpern-566-4406